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OF

CASES

ARGUED AND DETERMINED



THE SUPREME COURT

LOUISIANA.

By MERRITT M. ROBINSON.

VOLUME III.

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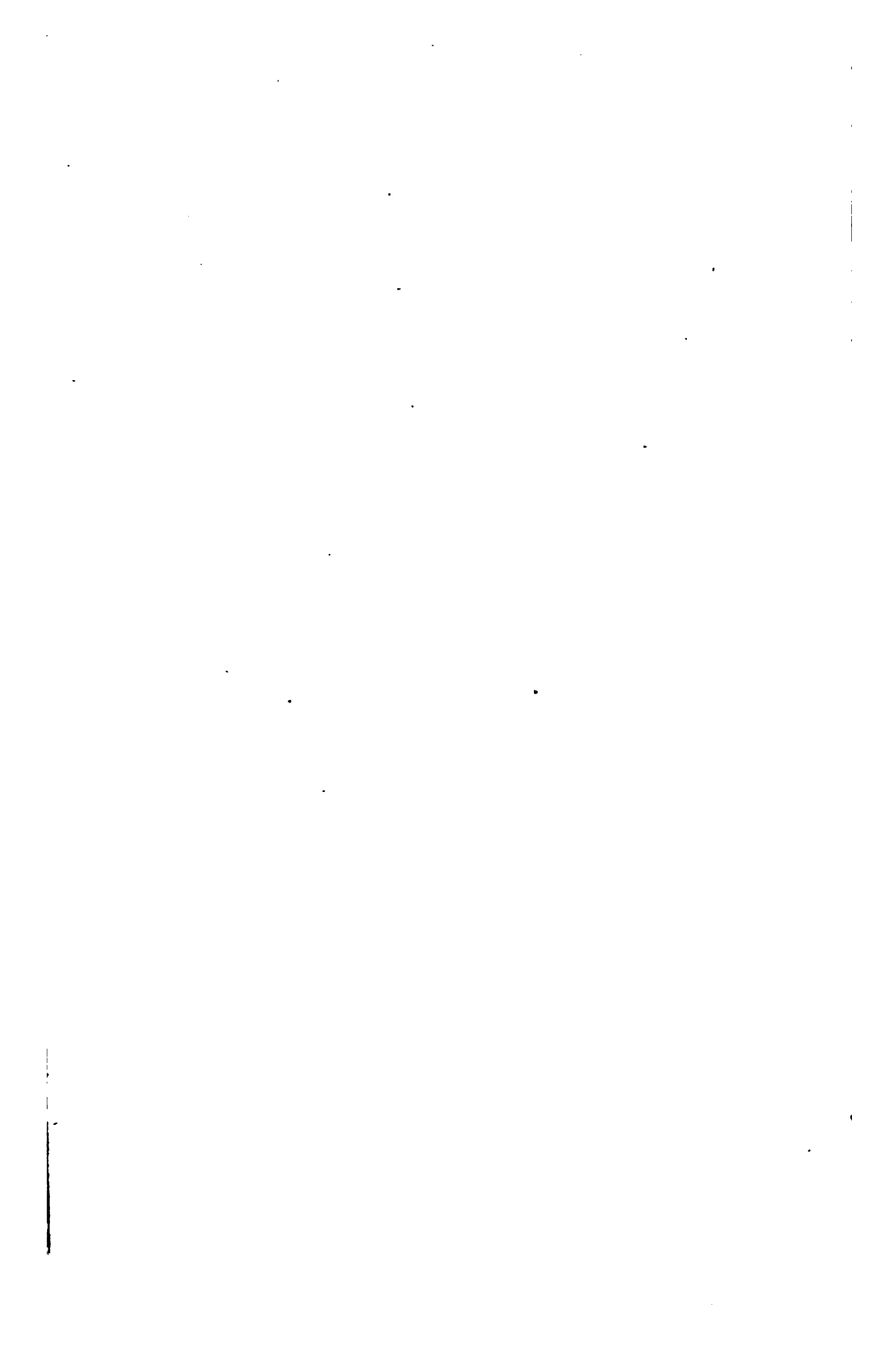
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JUDGES
OF THE
SUPREME COURT,

DURING THE TIME OF THESE REPORTS.

HON. FRANÇOIS XAVIER MARTIN
HON. HENRY A. BULLARD.
HON. ALONZO MORPHY.
HON. EDWARD SIMON.
HON. RICE GARLAND.

ATTORNEY GENERAL.
CHRISTIAN ROSELIUS, Esq.



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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF LOUISIANA,
IN THE
WESTERN DISTRICT, AT OPELOUSAS,
COMMENCING, SEPTEMBER, 1842.

PRESENT :

HON. FRANÇOIS XAVIER MARTIN.
HON. ALONZO MORPHY.
HON. EDWARD SIMON.
HON. RICE GARLAND.

HENRY R. LEE and others v. SAMUEL KEMPER and others.

Where an appellee resides in the State, service of citation of appeal must be on the party himself, and not on his counsel.

Under the act of 20th March, 1839, time will be allowed to correct any errors or omissions in the record, or in the service of citation of appeal, where such errors or omissions did not result from the fault or neglect of the applicant.

APPEAL by Kemper, from a judgment of the District Court of St. Mary, *King, J.*

Maskell, for the plaintiffs.

Splane, for the appellant.

SIMON, J. This appeal was brought up and filed on the 11th of September, 1841. A few days afterwards, the appellees' counsel filed a written motion for a dismissal thereof, on the ground that no citation of appeal had been served upon his clients ;

and, in the meantime, procured a writ of *certiorari* to be issued for the production of certain documents necessary to complete the record. This last proceeding had the effect of continuing the case until the present term; and, during the interval, no step whatever was taken by the appellant to cure the defect complained of by the appellees, by causing the citation of appeal to be served upon them, instead of their counsel, on whom the said citation had been originally served.

The plaintiffs' commercial house is stated, in the petition, to be in New Orleans, where two of the partners reside; and it is clear that the citation of appeal should have been served on them, and not on their counsel. Code of Practice, arts. 198, 582. 10 La. 580.

Since the enactment of the law of 1839, we have generally allowed time to parties to correct any defect or omission existing in the records brought before us, or in the service of the citations of appeal, whenever such defects or omissions were not the consequence of their own fault or negligence. But, in this case, the appellant had more than a year to procure a new service of the citation of appeal; he had notice of the written motion of the appellees; and it was his duty to take advantage of the delay occasioned by the issuing of the writ of *certiorari*, which had caused the case to be continued. Having not done so, he was clearly guilty of neglect; and he cannot complain, if, on the renewed motion of the appellees' counsel, we dismiss his appeal. We think he cannot be entitled to any further indulgence.

Appeal dismissed.

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JACOB W. KING v. HENRY C. DWIGHT, Executor.

Subrogation, whether legal or conventional, invests the person in whose favor it takes place, with all the rights, actions, privileges, and mortgages of the creditor against his debtor.

One who has paid the debt due to a plaintiff, and been expressly subrogated to his rights, may take out execution against the defendant. Such an express subrogation, is equivalent to an authority to use the plaintiff's name in prosecuting the suit for the recovery of the debt.

APPEAL from the District Court of St. Mary, King, J.

W. C. Dwight, for the appellant.

Maskell, and Lewis, for the defendant.

MORPHY, . The petitioner has appealed from a judgment dissolving an injunction he had obtained to arrest the execution of an *alias fieri facias*, on the ground that he had paid the full amount of his debt. It appears from the record that Henry C. Dwight, as executor of Gideon Boyce, had caused certain property to be seized in the hands of one James Swan. That the same was sold in due course of law, at a credit of twelve months, and was adjudicated to the present plaintiff on the 7th of July, 1838. That, on the twelve months' bond becoming due, an execution was issued on it against the plaintiff, and his sureties. That on the 22d of August, 1839, plaintiff's debt having been reduced to \$1240 58 by the sale of his property and divers partial payments, this balance was paid to the said executor by Thomas Maskell, who received from him a subrogation to all his rights as plaintiff in the suit in which the twelve months' bond had been taken. Under this subrogation Maskell sued out, in the name of the original plaintiff, the execution which is now enjoined. The appellant has not shown that the money paid by Maskell belonged to him, or that Maskell had paid it as his agent, or in his discharge. Maskell, on the contrary, appears to have acted on his own behalf, and took care to secure himself, by procuring from Dwight an express subrogation to all his rights. The well known effect of a subrogation, whether, legal or conventional, is to vest in the person in whose favor it takes place, all the rights, actions, privileges, and mortgages of the creditor against his debtor; it, therefore, in our opinion, entitled Maskell to all the remedies existing in favor of Dwight, and he could take out an *alias* execution in the same manner as the latter himself could have done. Civ. Code, 2156. This right has, however, been denied by the counsel for the appellant. He has referred us to the case of *Fluker v. Turner*, 5 Mart. N. S. 707, in which we held, that he who has an interest in a judgment, without being a party on record, cannot control the execution. In that case, a creditor of the plaintiff had caused his judgment to be seized on execution, and all the latter's interest in it had been sold to the defendant in the

The Mechanics and Traders Bank of New Orleans v. Compton and others.

suit. The person who subsequently took out an execution, could not pretend to derive any authority from the plaintiff, or to exercise his rights, which had all been sold to the defendant in the suit, as, in the present case, the original plaintiff's rights and remedies have all been transferred to Maskell. Dwight's express subrogation was equivalent to an authority conferred on Maskell, to use his name in prosecuting, as he could have done himself, the recovery of the debt which he had just been paid, and which he transferred to Maskell in consideration of such payment.

Judgment affirmed.

THE MECHANICS AND TRADERS BANK OF NEW ORLEANS v.
ALEXANDER COMPTON and others.

Notice of protest must be directed to the post office nearest the residence of the person to whom it is sent. Even where a party has been in the habit of receiving his letters at different offices, and is proved to have had a box in the most distant of the two, notice of protest directed to the latter will be bad.

APPEAL from the District Court of St. Landry, *Willson, J.*

Linton and I. E. Morse, for the appellants.

Lewis, for the appellee.

MARTIN, J. The plaintiffs are appellants from a judgment in favor of the defendant, Walker, the endorser of the note sued upon, on the ground of want of due notice. Two objections were made to the notice: the first, that it was not put in the post office in due time; the second, that it was not directed to the endorser, at the post office nearest to his residence.

The counsel for the plaintiffs contends, that it clearly appears from the notary's certificate that he made the protest on the sixth day of March, 1839. After stating that the letters were deposited in the post office, the notary adds that all was done in the presence of the witnesses; and the act is subscribed on the day aforesaid. This appears to us conclusive,

The notice to the endorser was directed to him at the post office in Alexandria. It is in evidence that there is a post office at Cotile,

Succession of John N. Field—Maskell, Administrator, Appellant.

which is nearer to his residence. There is evidence of his receiving his letters and papers at each of these offices, and that he has a box at that of Alexandria. We are of opinion that when a party receives his letters and papers at two post offices, notices ought to be sent to the office nearest to his residence, even where it appears that he has a box in the other.

SUCCESSION OF JOHN N. FIELD—THOMAS MASKELL, Administrator, Appellant.

The right of a mortgage creditor is on the thing itself, and may be exercised into whatever hands it may pass.

A sale by the administrator of a succession of property held by the deceased, subject to a mortgage, gives the mortgagee no claim against the succession. His rights cannot be affected by such a sale; and he must pursue the property in the hands of the subsequent third possessor.

Where the creditors of a succession are litigating their rights contradictorily with each other, and the value of the succession exceeds three hundred dollars, an appeal will lie to the Supreme Court, though the claim of each creditor may not amount to that sum.

APPEAL from the Court of Probates of St. Mary, *Palfrey, J. Gibbon*, for the appellant.

Dwight, for the appellee.

SIMON, J. This is an appeal from a judgment sustaining the opposition of Ethan Allen as administrator of the estate of Thomas Bell, to the tableau of distribution filed by Thomas Maskell, as administrator of the estate of one John N. Field. The opposition is founded on a judgment obtained by Thomas Bell, deceased, against one Nerson, for \$160, with interest and costs, on the 23d day of June, 1831, and recorded on the 6th of July following, which had the effect of a judicial mortgage on all the property of the debtor. Several years afterwards, an execution having been issued against Nerson by other creditors, it was levied on a negro man named Bell, who was sold by the sheriff, and John N. Field having become the purchaser thereof at said sheriff's sale, acquired the property subject to several anterior judicial mortgages,

Succession of John N. Field—Maskell, Administrator. Appellant.

the first of which appears to be the mortgage which is the subject of the opposition. John N. Field stood, therefore, towards Bell, in the capacity of a third possessor of property mortgaged to secure his claim, and was liable to be acted against as such, Bell's mortgage being a general and not a special one. Code of Pract. arts. 709, 710, 713 and 715.

The opponent contends that he is entitled to be placed on the tableau of distribution of Field's estate, for the amount of his judgment, with a privilege on the proceeds of the sale of the slave Bell, who was sold by the succession. This was allowed by the inferior court, which sustained the opposition, and the administrator of Field's estate has appealed.

From the view we have taken of the plea to our jurisdiction, filed by the appellee's counsel, we should abstain from expressing any opinion on the merits of the opposition; but it becomes necessary for us, however, in order to establish the rule by which our jurisdiction is to be tested, to examine into the quality in which the opponent stands towards the estate of John N. Field. This will, perhaps, present the anomaly of our showing the error committed by the inferior court, without being able to afford the appellant any remedy to correct it in this court.

It is clear that the appellee is not properly a creditor of Field's estate. The deceased was a mere third possessor, who, whilst in possession of the property, was subject to the hypothecary action of the creditor, in the same manner, and under the same rules and restrictions, as a third possessor of mortgaged property. Code of Pract. art. 709. The rights of a mortgage creditor rest on the thing itself, and are to be exercised into whatever hands it may pass, and cannot be affected by the sale thereof, made either by the deceased himself or by his estate. *Offutt et al. v. Hendley et al.* 9 La. 14. Considered in this light, the administrator of Bell's estate has nothing to claim against Field's estate, and can only pursue the property in the hands of a subsequent third possessor. If this be correct, the claim set up by the appellee is not only distinct from those of Field's creditors, but is utterly foreign to the affairs of his succession. It makes no part of the *concurso*, and the appellee cannot be said to be one of the creditors of the deceased, litigating his rights contradictorily with the others, in which

Hollander v. Nicholas.

last case we have uniformly maintained our jurisdiction, although the rights or claims of each of the creditors might be under \$300, provided the amount or value of the succession was above that sum. Code of Pract. art. 1049, 1050.

Under this view of the question, we think we are without jurisdiction in this case, and that the exception filed by the appellee must prevail.

Appeal dismissed.

JOHN HOLLANDER v. ROBERT CARTER NICHOLAS.

An overseer, though entitled to a privilege on the crop for the payment of his wages, cannot maintain an action against his employer in the parish in which the plantation is situated, where the domicil of the latter is in a different parish. The privilege granted by law to overseers, is, like all others, an accessory to the principal obligation, and must follow it.

APPEAL from the District Court of St. Mary, King, J.
Maskell, T. H. Lewis, and W. B. Lewis, for the plaintiff.
J. P. Conrad, and Splane, for the appellee.

GARLAND, J. The defendant, a resident of the parish of St. James, was sued in the parish of St. Mary, by his overseer on a plantation in the latter parish, to recover \$1500, his wages for the year 1841. The plaintiff alleges that he has a privilege on the crop of sugar made on the plantation; and, on his affidavit that the defendant was removing a part of the same out of the jurisdiction of the District Court of St. Mary, a writ of provisional seizure was asked for and issued, which was levied on a portion of the crop. The account filed with the petition shows, that the wages were not due until the 1st of January, 1842, and this proceeding was commenced eleven days previous. The defendant excepted to the jurisdiction of the court, as he was not a resident of the parish in which he was sued, which exception was sustained; and the plaintiff is appellant from a judgment of dismissal.

It is admitted that the defendant is the owner of a large plantation in the parish where he was sued, but has his domicil in St.

Garrett v. Grimball and another.

James. The plaintiff contends that, as he has a privilege on property in St. Mary to secure the payment of his claim, he has a right to institute his action for the principal demand there, on the ground that it would be very inconvenient for him to sue the defendant at his domicil, and that his privilege might be lost by the delay and necessity of going to a distant parish, to obtain the process necessary to preserve it. He contends that there ought to be an exception in his favor.

The privilege accorded by law to overseers to secure the payment of their wages, is, like all others, an accessory to the principal obligation, and must follow it. The doctrine contended for would make the principal subservient to the accessory. The exception is not made by law, and cannot be allowed by us. Civ. Code, arts. 3153, 3184. Code Prac. arts. 162, 284.

Judgment affirmed.

JAMES A. GARRETT v. JOHN D. GRIMBALL and another.

The court has no authority to give damages for a frivolous appeal, when not prayed for.

APPEAL from the District Court of St. Mary, King, J.

There was judgment below in favor of the plaintiff, from which the defendants have appealed.

Splane, for the plaintiff.

Gibbon, for the appellants.

MORPHY, J. In this suit, which is on a note executed in favor of the plaintiff by Grimball, one of the defendants, who are ordinary partners, the evidence fully establishes that Grimball was authorized to sign the partnership name, and that Wright has frequently paid notes thus signed by his partner. We would allow damages for the frivolous appeal, if we thought ourselves authorized to grant them, when not demanded.

Judgment affirmed.

JOHN E. SPEIGHT v. JARED W. SANDERS, Administrator.

APPEAL from the Probate Court of St. Martin, *Briant*, J.

Magill, for the plaintiff.

Dwight, for the appellant.

SIMON, J. The claim of the plaintiff is founded on an account for services alleged to have been rendered to the deceased, in taking care of his property during a length of time ; which account, after deducting certain credits, leaves a balance in favor of the plaintiff, amounting to \$1550, for which he prays judgment against the succession of his employer.

The defendant first pleads the general issue, sets up certain matters in avoidance of the plaintiff's demand, and concludes by praying judgment against the plaintiff for the sum of \$101 25, which is the amount of a note due by said plaintiff to the succession of the deceased, and filed with said defendant's answer. The note was executed after the death of the deceased, and is made payable to the defendant as administrator.

There was judgment below in favor of the plaintiff for the sum of \$33 75, which is the balance allowed him for the value of the services proved, after deducting therefrom the amount of the note annexed to the defendant's answer. From this judgment the defendant has appealed.

An attentive perusal of the evidence has not enabled us to discover any error in the judgment appealed from. It seems to us that the plaintiff complains of it with bad grace ; as, from the facts that he executed the note claimed by the administrator on the 14th of January, 1840, and that his services appear, from his own account, to have ceased on the 15th of the same month, he might, perhaps, be fairly presumed to have had no claim against the succession at the time that he executed the note. However it may be, the weight of evidence does not seem to us to preponderate so much in favor of the plaintiff, as to permit us to alter in any way the judgment appealed from.

Judgment affirmed.

Hall, Tutrix, v. Sanders, Administrator, and another.

CATHERINE HALL, Tutrix, v. JARED W. SANDERS, Administrator,
and another.

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Where it does not appear from the record, that the amount in controversy exceeds three hundred dollars, the appeal must be dismissed. The appellant must show that he is entitled to an appeal.

APPEAL from the Probate Court of St. Martin, *Briant*, J.
Magill, for the appellant.
Dwight, for the defendants.

GARLAND, J. This suit is brought by the tutrix of the minor heirs of William G. Sanders, deceased, against the administrator of the succession, and his security, to remove the former from office, and to compel a settlement of his account. There was a judgment of dismissal, and the plaintiff has appealed. In this court the defendants have excepted to our jurisdiction, on the ground that it does not appear that a sum exceeding \$300 is in controversy. From the record we cannot ascertain the amount of the succession, and are unable to say what is the sum the parties are litigating about. It is the business of the appellant to show that she is entitled to an appeal, and having failed to do so, her cause must be dismissed.

Appeal dismissed.

CHESTER CLARK and others v. SAMUEL KEMPER and others.

Where an undertaker has not complied with the terms of his contract for the erection of a house, but his employer receives and uses it, the latter will be bound to pay for the value of the work.

APPEAL from the District Court of St. Mary, *King*, J.
Maskell, for the plaintiffs.
Splane, for the appellant.

SIMON, J. The plaintiffs sue as endorsees of a promissory note, originally made payable to the order of one Albert Allen, by whom it is endorsed. The note is also endorsed by other persons, who, together with Allen and the appellant, are made parties defendants.

Clark and others v. Kemper and others.

There was a judgment by default against all the defendants except Kemper, the drawer of the note, who pleads, in his answer, that the note was given in error, it being for carpenter's work done for him by Allen, the payee of the note, in the construction of a dwelling house. He alleges that the work was bad ; that the house was not built in a skillful and workmanlike manner ; that the roof leaks considerably ; and that he has suffered damage to the amount of \$500. He also states that he gave the note before examining the work ; that it was transferred to the plaintiffs after it became due ; and to prove this last fact, the plaintiffs were ordered to answer certain interrogatories propounded to them by Kemper, which interrogatories have never been answered.

The plaintiffs had judgment against Kemper, for the amount claimed, from which judgment he has appealed.

The evidence shows to a certain extent that the work was bad, and that the house in question was not built in such manner as to satisfy the owner. Indeed, the testimony of all the witnesses proves that it was incompletely and unskillfully done, and that the defects were such as to occasion considerable expense to the owner in order to have it thoroughly repaired and completed, if he had chosen to do so. But the evidence shows, also, that the defendant received the house such as it was ; that he has sold the house since it was finished ; that he lived in it a year before selling it ; and that he had no repairs made upon it before he left it.

This case is very similar to that of *Loreau v. Declouet*, 3 La. 3, in which this court said, that "if the owner use the building, he is bound to pay the workman the value of the labor he has expended on it." In that case, the facts proved that the owner had proceeded to have the building repaired, and the amount of the expenses being satisfactorily established, there was judgment in favor of the workman for the difference, which was really the value of his work. That judgment was so rendered, because the owner had received and used the building after it was delivered. In this case, however, it appears that the owner never had any repairs made, and that he used and sold the house ; and the evidence, with regard to the real value of the work, is so uncertain and unsatisfactory, that it is impossible for us to find out what amount should be deducted from the plaintiffs' claim, or to say that they are not

Lebesque v. Bonin.

entitled to the amount claimed in their petition. The judge *a quo*, thought that Kemper had not made out his defence, and that he was not entitled to any deduction; and from the state of the case, we are unable to say that he erred.

Judgment affirmed.

PIERRE LEBESQUE v. MARCELITE BONIN.

Where the purchaser knew of the defects before the sale, no redhibitory action will lie.

APPEAL from the District Court of St. Martin, *King, J.*

Voorhies, for the appellant.

Delahoussaye, and *I. E. Morse*, for the defendant.

MARTIN, J. The plaintiff is appellant from a judgment against him in a redhibitory action. The case turns entirely on matters of fact, and presents no question of law. It does not appear to us that the District Court erred. Much testimony was offered on each side, and in weighing it the conclusion would have been in favor of the plaintiff, had it not appeared that he knew of the disorder under which the slave labored; and bought her at the solicitation of his wife, the defendant's sister, who was well acquainted with the disorder, and was extremely desirous of having the slave as a cook, as the plaintiff owned her sister, whom he had purchased although she labored under hernia, for nearly the same price which he gave for the other.

Judgment affirmed.

ADOLPHE FOLLAIN and others v. HYACINTHE LEFEVRE.

Art. 439 of the Code of Practice, making it the duty of the court which grants a commission to take testimony, to fix a day for its return, was intended to obviate any dispute as to the sufficiency of the time allowed for its execution, when the case should be called for trial before its return. But the neglect of the court to fix a return day, will not render the commission null.

No evidence will be required of the official capacity of functionaries commissioned by the State.

A commission to take testimony, directed to "any one of the associate judges of the City Court of New Orleans," appeared from the record to have been executed by one N. Jackson. There being no associate judge of that name, on an objection to its admission, and allegation by the party that it was a clerical error for O. P. Jackson, an actual judge of that court: *Held*, that the record not having been corrected by *certiorari*, the error is fatal.

APPEAL from the District Court of St. Martin, *Boyce, J. Voorhies*, for the plaintiffs.

T. H. Lewis, W. B. Lewis, and I. E. Morse, for the appellant.

MORPHY, J. The defendant is sued for the price of groceries and merchandize, alleged to have been furnished at his special instance and request to the firm of Murphy & Margain, for the use of a saw mill at Lake Chicot, in the parish of St. Martin. It is further alleged, that the partnership, although carried on under the style of Murphy & Margain, was, in fact, at the time of the purchase of those goods, composed of John B. Murphy, L. Margain, and the defendant, the latter being equally interested with Margain in dividing the profits and sustaining the losses. That the petitioners, being unacquainted with the said Margain, whom they would not have trusted, were induced to deliver the goods in consequence of the defendant's promises to become personally responsible for the same. The defendant pleaded the general issue, averring that he never was interested in the partnership of Murphy & Margain, nor ever became personally liable or bound for any of the debts of the partnership, which was a particular, and not a commercial partnership. That after the death of Margain, one of the partners, he was appointed administrator of his estate, and received a power from J. B. Murphy, the other partner,

to collect the moneys due to the partnership, and to pay its legitimate debts; that any promise he may have made to pay the whole or any part of the plaintiffs' claim, must be understood as having been made by him in his capacity of administrator and agent, &c. The plaintiffs obtained a judgment below, from which the defendant has appealed.

The counsel for the defendant has called our attention to a bill of exceptions to testimony taken under a commission directed to one of the associate judges of the City Court of New Orleans. His objections were, that the commission did not mention the time at which it should have been returned into court, and that it did not appear to have been executed by any one of the officers to whom it was directed. Article 439 of the Code of Practice, upon which the first objection is based, appears to us entirely directory. The duty imposed on the judge who grants a commission, of fixing a return day, was no doubt intended to avoid delay and all dispute about the sufficiency of the time elapsed for its execution, when the case is called up for trial before its return. We do not think that the pain of nullity attaches to or results from the neglect of the judge to fix a return day, although it is made his duty to do so. But the second objection urged by the appellants, is, we apprehend, fatal. The commission purports to have been executed by one *N. Jackson*. We have more than once held that we would not require evidence of the official capacity of functionaries commissioned in this State, and would take notice of the offices held by them; but we know of no associate judge in commission bearing the name affixed to this document. It is said to be a clerical mistake, and that the name of *O. P. Jackson* was intended to be written. If so, it should have been corrected by means of a *certiorari*. We are bound to presume that the transcript is a true one, and as the record now stands before us, we cannot consider the commission as executed by any one of the magistrates to whom it was directed.

Although the evidence of the plaintiffs is considerably weakened, when we disregard the testimony taken under the commission, yet the record contains enough, in our opinion, to sustain the judgment appealed from. In the fall of 1839, when the defendant had long ceased to be the curator of Margain's estate, the

plaintiffs' account for the articles sold to Murphy and Margain was presented to him, and payment demanded by one Darbes. He said that he would then pay in cash a part of the account, and would pay the balance if they allowed him time. In the same conversation, he stated that he would pay the whole account. To another witness, Bonaface, the defendant stated, that he would pay the account due Follain, Bellocq, and Degelos, because he had presented Margain to them; that having introduced him to the plaintiffs, he felt, in honor, bound to pay the debt, and spoke of the account as amounting to about \$1000. He refused to pay an account due to Bonaface by Murphy & Margain, saying that he was not their partner; and gave as a reason why he would pay plaintiffs, that he had introduced Margain to them. The evidence shows that although defendant was not a partner with Murphy and Margain in the saw mill, he had in it, by reason of his advances to Margain, a sufficient interest to see it provided with the necessary supplies, and to incur the responsibility which he readily admitted, when the account was presented to him.

Judgment affirmed.

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DÉSIRÉ JUDICE V. FRANÇOIS CHRÉTIEN.

The Registers of the Land Offices of the United States, may, like all other keepers of public records, give copies or extracts from any books or documents in their custody, and such copies, when duly certified, are admissible in evidence; but they cannot attest or certify the contents of such books or documents in any other manner.

APPEAL from the District Court of St. Martin, *Boyce, J.*

Voorhies, for the appellant.

T. H. Lewis, W. B. Lewis, and I. E. Morse, for the defendant.

MARTIN, J. The plaintiff claims damages for a trespass committed on lands which he alleges to be his, and prays that he may be declared the lawful possessor, as owner thereof. There was a judgment against him, and he has appealed.

The case is before us on a bill of exceptions, taken by his counsel to the opinion of the District Court refusing to admit in evi-

Trustees of St. Martinsville v. Joseph Eyssalenne and another.

dence a certificate of the Register of the Land Office at Opelousas, attesting that the plaintiff's claim to the premises had been allowed by the then Register and Receiver of the Office, as appeared from the books in the possession and keeping of the Register.

It does not appear to us that the District Court erred. The Registers of the Land Offices of the United States may, indeed, like all other keepers of public records, give copies or extracts of any books or documents in their custody, and such copies duly certified are admissible in evidence ; but they cannot attest or certify the contents of such books or documents in any other manner.

There is an early decision on this point as to clerks of courts, in the Reports of Cases decided in the Superior Court of the Territory.

The judgment of the inferior court reserves to the plaintiff his right to claim the premises in another suit.

Judgment affirmed.

THE TRUSTEES OF THE TOWN OF ST. MARTINSVILLE V. JOSEPH EYSSALENNE, and another.

APPEAL from the District Court of St. Martin, *King, J.*

I. E. Morse, for the plaintiffs.

Voorhies, for the appellant,

MARTIN, J. The defendant, Eyssalenne, is appellant from a judgment maintaining an injunction, which the plaintiffs had obtained to prevent his encroachment on Madison street, as laid out in the first plan of the town of St. Martinsville.

The case turns entirely on a matter of fact, and presents no question of law. The evidence shows that Madison street, in its whole extent, according to the first plan of the town, had a width of ninety-nine and a half feet, but that afterwards the owners of the lots bordering on that street on the same side with that of the appellant, were suffered to occupy thirty-two feet of the street before their respective lots, thus reducing it to a width of sixty-seven and a half feet.

The appellant contends that he has an equal right to occupy the thirty-two feet of the street opposite to his lot. The plaintiffs and appellees allege that he has no right to avail himself of the indulgence, with which they have tolerated the encroachment on Madison street in a part of it, where such encroachment left the street of sufficient width ; that the lot of the appellant is immediately in front of that on which the public buildings of the parish are erected ; and that the extension of the front line of his lot towards those buildings, would render the access to the main road leading out of town towards New Iberia, extremely inconvenient ; that this circumstance, joined to the utility of having a wider space open in front of the public buildings than in the rest of the street, had prevented the indulgence, of which the owners of some lots had availed themselves, from being extended to the appellant. That he purchased his lot according to the original plan on which Madison street had a width of ninety-nine and a half feet ; and that one front of his lot was on that street and the other on the next, viz., Judice street ; that his title never extended beyond these two fronts, and he cannot avail himself of the indulgence granted to others, especially where strong reasons militate against its extension to him.

Judgment affirmed.

BENJAMIN GRANT V. STEPHEN DEUEL.

To maintain an action for a malicious prosecution, the plaintiff must prove : *first*, the prosecution ; *second*, that the defendant was the prosecutor, or the cause of the prosecution ; *third*, that he was actuated by malice ; *fourth*, that there was no probable cause for the prosecution.

In an action for a malicious prosecution, malice may be established : *first*, by proving express malice ; *second*, by showing want of probable cause for the prosecution. Malice is usually inferred from the want of probable cause.

It is a well settled rule of law, founded on principles of policy and convenience, that the prosecutor shall be protected, though his private motives may have been malicious, provided he had probable cause for the charge. Where express malice has been proved, there must be some positive evidence to show that the prosecution was groundless, though slight evidence will be sufficient.

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Grant v. Deuel.

An acquittal, or even subsequent proof of complete innocence, is not sufficient evidence of want of probable cause.

Proof that the jury entertained doubts on the evidence, or deliberated as to the guilt of the accused after the case was concluded, is proof of probable cause for the prosecution.

APPEAL from a judgment of the District Court of St. Landry, King, J., in favor of the plaintiff, for one hundred and twenty dollars damages.

Martin and King, for the plaintiff.

T. H. Lewis and W. B. Lewis, for the appellant.

GARLAND, J. This is an action to recover damages for a malicious prosecution, and for the injury sustained by the plaintiff's character and health in consequence of it, and of his confinement in prison at an inclement season of the year. There was a judgment rendered on the verdict of a jury in favor of the plaintiff, and the defendant has appealed.

At the November Term, 1841, of the District Court in the parish of St. Landry, the plaintiff was indicted and tried, with another person, for stealing some hogs, alleged to have belonged to the defendant, and acquitted of the charge. Being unable to give the bail required for his appearance, the plaintiff was confined in prison for several days previous to his trial, in cold weather, where it appears that he suffered considerably from the want of sufficient bedding and clothing; and it is shown that he was afterwards much indisposed in consequence of the exposure and confinement. The prosecution was commenced at the instance of the defendant, who called on the District Attorney, told him that he had been informed that the plaintiff and another person had been stealing his hogs, named the witnesses by whom the crime could be proved, and requested the attorney for the State to lay the matter before the Grand Jury.

To maintain this action, it is necessary to prove; *first*, that the plaintiff was prosecuted; *second*, that the defendant was the prosecutor; *third*, that the defendant was actuated by malicious motives; and *fourth*, that there was no probable cause for the prosecution.

That the plaintiff is the person who was prosecuted is not denied. That the prosecution was commenced in consequence of the complaint made by Deuel to the District Attorney is unquestiona-

ble. He was not, perhaps, a prosecutor, in the legal meaning of the term in England and in many of the States where the common law prevails, yet he was the *actor* or moving cause in the prosecution, and is liable in damages for any injuries the plaintiff may have sustained, unless protected by law. 2 Starkie on Evidence, 908. 2 Bouvier's Law Dic. 306. 1 Chit. Cr. Law, 1 to 10.

The malicious intention of the defendant may be established in two modes; *first*, by proving express malice; *second*, by showing that there was no probable cause for the prosecution. If the first be proved, still some evidence of want of probable cause must be given; but, slight evidence will be sufficient. 2 Starkie on Ev. 914. 1 Camp. 203. The fact of malice is usually inferred from the want of any probable cause or excuse for the prosecution. 2 Starkie, 912. 1 Salkeld, 14. 1 Lord Raymond, 374. Addison's Rep. 270.

The plaintiff has endeavored to prove express malice in this case, in which we think he has not succeeded. His counsel urges, that malice is shown from the conversation which took place between the parties in presence of the witness Thayer. The purport of this conversation was, that defendant told the plaintiff he had understood that he (plaintiff) had been stealing some of his (defendant's) hogs, which he had purchased from Caswell, and threatened to prosecute him for it. Deuel said he would have his hogs or he would prosecute. He told Grant in what way he got the hogs, and said that he would prosecute any one who should take them. Grant admitted he had killed some hogs for Caswell or his wife, and something was said about selling the hogs. In these remarks, we cannot discover that wicked and perverse disposition which shows a heart regardless of social duty, and bent on mischief. They indicate that state of feeling, which would arise in the bosom of most men when informed that their property had been unlawfully taken from them, and when they saw the supposed wrong-doer before them.

It is further urged, that the defendant entertained malicious feelings towards the plaintiff, because he had failed in his improper designs upon the person of a married daughter of Caswell's wife, and in consequence of the not very delicate remarks made.

to him by the plaintiff. It appears to us that this is rather a strained conclusion. The plaintiff is not in any manner connected with the two females in question. He does not appear to have been informed of the designs of the defendant, or to have interfered in any manner with his purposes; it is, therefore, difficult to believe that the defendant, on that account, entertained towards him any such malicious feeling as would induce the commission of an unlawful and wicked act. The plaintiff and defendant had never had any difficulty previously. They lived a considerable distance apart, and were but slightly acquainted with each other. If the defendant entertained any malicious feelings, in consequence of his alleged disappointment, they would most probably have been vented upon Caswell's wife, as it is shown, that she was the person who employed the plaintiff to kill the hogs, and received the fruits of his labor.

The inference of malice is involved in the question of probable cause, which we will now consider. This is a question of law, arising out of the facts.

Where a party prosecutes another on a criminal charge, it is a well settled rule of law, founded on principles of policy and convenience, that the prosecutor shall be protected, though his private motives may have been malicious, provided he had probable cause for preferring the charge. 1 Term Rep. 520. 1 Salkeld, 14, 15, 21. This protection is not only one of convenience, but of justice and necessity; and if proof of want of probable cause were not required on the part of a plaintiff, every prosecutor would be exposed to an action, in every case of acquittal. There must be some positive evidence to show that the prosecution was groundless. 2 Starkie on Ev. 913. 15 La. 279. 2 Wash. C. C. R. 465. 1 Peters' Dig. 62, Nos. 300, 301.

It is not sufficient, on the part of the plaintiff, to show that he was acquitted of the charge; he must prove that there was no reasonable ground for it. 9 East, 361, 363. It is not necessary, in the present case, to detail all the evidence given on the trial, to show that there was no probable cause for the indictment. It was, in our opinion, sufficient to authorize the acquittal of the plaintiff; but it is not every verdict of "not guilty", nor even subsequent proof of complete innocence, that shows a want of proba-

ble cause in the incipient stages of a prosecution. A man's conduct may, from his folly, his neglect, or his ignorance, be such as to justify a suspicion of guilt, and produce a prosecution in the course of which it may be made to appear that he is clearly innocent; but this will not authorize an action for a malicious prosecution. But independent of the facts of a case, there are certain acts on the part of the tribunals, which the law says go very far to show probable cause. If it appear that the jury, on the trial of the plaintiff, entertained doubts about the evidence, and deliberated as to his guilt after the case was concluded, it seems to be evidence of probable cause. 2 Starkie on Ev. 916. 3 Esp. R. 7.

In Massachusetts it has been held that the conviction of the plaintiff by a justice having jurisdiction of the offence, is conclusive evidence of probable cause, although he was acquitted on appeal. 15 Mass. 243. In Virginia, a magistrate's committing a person accused of felony, or binding him in a recognizance to appear at court and answer the charge is sufficient evidence of probable cause, though the party be afterwards acquitted; unless he prove clearly there was no probable cause. 4 Munford, 462. In this case, it appears the Grand Jury not only found a true bill, but that the petit jury deliberated for ten or fifteen minutes as to their verdict. These are strong circumstances of probable cause for the prosecution, in the absence of any proof of fraud or perjury to produce such results.

Independently of the legal presumptions of law already stated, the evidence discloses sufficient grounds of probable cause. Deuel had such a legal right to the hogs as would enable him to maintain a prosecution for stealing them. He was informed by Arnais, some months before the District Court, that the plaintiff and Caswell had killed his hogs. The hogs had disappeared, and when the defendant, in the conversation at Thayer's, charged the plaintiff with stealing them, he did not make any such explanation as was calculated to remove the defendant's suspicions. When he spoke to Caswell on the subject, he says that he replied: "if I have killed any hogs of yours make me suffer for it." There is no doubt that some hogs were killed. All the witnesses state that fact; and the question is, whether they were the hogs of Deuel purchased at the sheriff's sale of Caswell's property? Caswell and

The State v. Martel and others.

his wife swear that they were not ; but were taken out of a gang that belonged to Caswell's wife as her separate property. Bihm, who assisted Grant in killing the hogs, says that they were Caswell's wife's. None of the other witnesses knew to whom the hogs belonged, nor what marks they bore, except Arnais, who says positively that they were Deuel's hogs ; and Henry Ort swears that Caswell's wife told him that the hogs Grant killed belonged to Deuel, being the same purchased by him at the sheriff's sale, and told him to tell Deuel that she would pay for six of them if he would not prosecute.

It has been strenuously urged upon us that the witness Arnais is unworthy of belief, and that his testimony carries falsity upon its face. We cannot so consider it. One witness says that he would not believe Arnais at all. One of the jury being sworn, says that he knows him, and has "no reason to disbelieve him."

In conclusion, we have to say, that actions of this description are not to be favored. We would scarcely fix a limit to the damages in a case where it could be shown that any one, for malicious and vindictive purposes, had availed himself of the criminal laws of the country to injure and oppress another without cause ; but, we are unable to see any such purpose on the part of the defendant ; and public policy and the proper administration of the criminal code, require us to protect him.

The verdict of the jury is set aside, and the judgment annulled ; and ours is for the defendant, with costs in both courts.

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THE STATE v. EUGENE MARTEL and others.

Where the condition of a recognizance is, that the principal shall appear at court to answer such matters and things as may be objected against him on behalf of the State, and shall not depart the said court, without leave thereof ; and no formal surrender has been made of him to the sheriff by his sureties, and the accused effects an escape from the court room while the jury are deliberating on his case, the recognizance will be forfeited. His sureties might have released themselves, at any time, by a surrender of their principal ; but until manifesting, by an actual surrender, their intention to be no longer bound, the principal remained in their custody, notwithstanding his appearance in court.

APPEAL from the District Court of St. Landry. Eugene Martel being in custody under an indictment for perjury, was released on entering into a recognizance in the sum of \$2000, with Chachère and Briant, as his sureties, the condition of which was as follows: "That if the said Eugene Martel shall personally be and appear before the Fifth District Court, in and for the parish of St. Landry, on the 25th day of November instant, or should the said court not be then held, then, on the first day afterwards on which the said court shall be held, then and there to answer to such matter and things as shall be objected against him on behalf of the State, and shall not depart the said court without leave thereof, then this recognizance to be void." Martel having appeared on the 25th of November, was arraigned, and his trial deferred until the following May term, when, as the jury were deliberating on their verdict, he effected an escape. The jury returned a verdict of guilty. The accused not appearing, and his securities having failed to surrender him, judgment was rendered against them, *in solido*, for the amount of the recognizance. The sheriff, and the deputy sheriff, proved that Martel had never been surrendered to either of them, by his sureties. The former testified that having been informed that the accused intended to effect an escape, he placed himself in the box with him, for the purpose of preventing the accomplishment of his purpose. The deputy sheriff testified, that while holding Martel, with a view to prevent his escape, he received a violent blow on the head, which compelled him to let the prisoner go. The court, King, J., gave judgment against the principal sureties, *in solido*, for the amount of the recognizance, from which judgment the latter have appealed.

Martin, for the State.

Linton and Voorhies, for the appellants.

MARTIN, J. The defendants, Chachère and Briant, sureties of Martel, on a recognizance, are appellants from a judgment against them. They had produced the body of their principal, who had been put upon his trial, and while the jury had withdrawn to consider their verdict, forcibly made his escape.

The counsel for the appellants have contended, that by producing the principal at the first call, the condition of their bond was complied with; that he had been placed in the custody of the sheriff,

and that they were not answerable for his escape from that officer. Nothing on the record shows that the sureties surrendered their principal, or that he was placed in the custody of the sheriff. The condition of the bond is, that the principal shall appear at the court, "*and shall not depart the said court without leave thereof.*" The breach of the recognizance is his departure without leave of the court. It is true the defendants might, at any time, have discharged themselves from their recognizance by the surrender of their principal; but no such surrender appears to have taken place. Notwithstanding the production of the principal, he remained in the custody of the defendants, his bail, until they manifested their design to continue no longer bound for him, by an actual surrender; for the recognizance expressly binds them after his appearance, in case he should *depart the said court without leave thereof.*

It is true that while the jury were out, the sheriff was informed that the accused intended an escape, and that he had armed himself to facilitate it; that the sheriff asked him whether he was armed, and being answered in the affirmative, required him to surrender his arms; that on his refusal, the sheriff called for aid, and that a struggle ensued, during which the escape was effected. If this may be called an escape from the sheriff, it cannot avail the appellants, because, having never surrendered the principal, he was still in their keeping.

The act of the legislature, passed in 1837, (Acts of 1837, p. 99, sec. 2,*) is conclusive against the defendants. It says ex-

* This act provides: Sect. 1. That all the sections of the said act [entitled an act supplementary to an act entitled, an act relative to the recovery of the amount of the bonds, obligations, and recognizances due to the State in criminal cases, &c., approved March 13th, 1818,] approved April 2d, 1835, except the seventh and eighth, be repealed; and that hereafter it shall be the duty of the Attorney General, and the several District Attorneys, in their respective districts, on the second or any other day thereafter, of each regular term of the Criminal Court of New Orleans, or of the District Court, leave of the court first had and obtained, which leave shall always be presumed, to call any or all person or persons who may have entered into any bond, recognizance, or obligation whatsoever, for their appearance or attendance at court, and also to call on the surety or securities to produce *instantly* in open court the person of such defendant or party accused; and upon failure to comply therewith, on motion of the attorney representing the State, the court shall forthwith enter up

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pressly, that the appearance and answer of the party accused, shall not operate as a discharge or release of the security from his responsibility, until after the trial and conviction or acquittal of the accused, unless the surety make a formal surrender of the accused in open court, or in the prison of the parish, and not otherwise. This was not done in the present case.

The defendants rely upon the decision of this court, in the case of *The State v. Cotton*, 19 La. 550. An examination of that case shows a very different state of facts. It was clear that Cotton, the accused, did not intend to escape from custody, or to evade a trial. His temporary absence from the court-house was for the purpose of procuring the attendance of his witnesses, and produced by being misinformed as to the day his trial was to take place.

Judgment affirmed.

judgment against both principal and securities, *in solidum*, for the full amount of the bond, recognizance, or obligation, which judgment at any time during the same term of the court for all the parishes of the State except the parish of Orleans, and for said parish of Orleans at any time within ten judicial days after notice of said judgment to the parties, may be set aside upon the appearance, trial, and acquittal, or upon the appearance, trial, and conviction, and punishment of the defendant or party accused; *provided*, that such judgment shall not be rendered in case it shall be made to appear to the satisfaction of the court, by the evidence of one or more disinterested and creditable witness, that such defendant or party accused is prevented from attending by some physical disability existing at the time.

Sect. 2. That hereafter the appearance and answer of any defendant or party accused, upon call made as provided for in the first section of this act, shall not operate as a discharge or release of any surety from his responsibility, and no such surety shall be discharged or released from his responsibility until the final trial and conviction or acquittal of such defendant, or party accused; *provided, however*, that any surety may be relieved from responsibility, by making a formal surrender of the defendant or party accused to the sheriff or his deputy, in open court, or within the four walls of the prison of the parish, and not otherwise.

 Thompson v. Chrétien and another.

SYDALISE THOMPSON v. GIRARD CHRÉTIEN and another.

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In an action on a joint contract, all the obligors must be made defendants, though one of them may have performed his part, or may be domiciliated in a parish beyond the jurisdiction of the court, parties contracting joint obligations being considered to waive the personal privilege of being sued before the court having jurisdiction over the places of their domicile; and the judgment must be against each defendant, separately, for his proportion.

In an action on a joint contract, the suit was dismissed by the inferior court as to one of the defendants, on the ground of his domicile being in a different parish. Plaintiff took no appeal from the judgment of dismissal, but obtained a judgment against the other defendant. On an appeal by the latter: *Held*, that the action being on a joint contract, both contractors must be before the court; that the plaintiff having failed to make use of the means given him by law to reverse the erroneous decision of the inferior court, cannot avail himself of his own neglect; and that there must be judgment as in case of nonsuit.

APPEAL from the District Court for the parish of St. Landry, *Lewis, J.* This was a action by the widow of one John Thompson, suing in her own right, and as the mother and natural tutrix of her minor children, against Girard Chrétien, a resident of the parish of St. Martin, and Hypolite Chrétien, of the parish of St. Landry. The plaintiff represents that her late husband, Thompson, believing himself largely indebted to the United States, conveyed to the defendants a large amount of property, to be sold or otherwise disposed of by them, to indemnify themselves against any loss they might sustain, as heirs of their deceased brother, Louis Chrétien, in consequence of the obligation of the latter to the government as security for Thompson. That the defendants advertised the property for sale; became themselves the purchasers of nearly all, at a great sacrifice; and have ever since possessed it. That its actual value greatly exceeded the amount which the defendants paid to the United States on account of Thompson. The petition further represents, that the defendants, to prevent Thompson from ever obtaining any benefit from the property conveyed to and subsequently sold by them, induced him to execute an act before a notary, by which he ratified the sales made by them. That the only consideration for that act, was the payment by the defendants, as heirs of their brother, of a sum of \$14,806 27, to the United States. That immediately after the exe-

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cution of the act of compromise, the defendants applied to Congress to have the amount paid by them refunded, and received \$12,999 of the \$14,806 27, originally paid by them, with interest thereon at six per cent, on the ground that the amount had been illegally collected from them. That, in consequence, the consideration for which the property was transferred to the defendants by Thompson, has wholly failed. The plaintiff concludes with a prayer, that the acts of sale to, and of compromise with the defendants, may be annulled; that they may be ordered to convey the property so obtained by them to the plaintiff, or to account for the value of any which may have been sold by them; or, in case such conveyance should not be decreed, that the defendants be ordered to pay to the plaintiff the amount received by them from the United States, with interest from the time when it came into their hands. -

Girard Chrétien excepted to the jurisdiction of the court, on the ground that his domicile was in the parish of St. Martin. The exception was sustained, and the petition dismissed as to him. The plaintiff took no appeal from the judgment of dismissal.

Hypolite Chrétien having answered, there was a judgment against him for the whole amount, and the plaintiff was considered to be entitled to recover.

Lewis, for the plaintiff.

I. E. Morse, and *Voorhies*, for the appellant.

SIMON, J. The appellant seeks the reversal of a several judgment against him for the whole claim of the plaintiff on a contract by which his co-defendant and himself are alleged to be bound to account for sundry tracts of land, slaves, &c., conveyed to them by Thompson the deceased, to indemnify them and a co-heir of theirs, against the consequences of a suretyship into which their ancestor entered for the husband of the plaintiff, in his bond to the United States as collector of a certain tax. The District Court sustained the plea of his co-defendant to its jurisdiction, on the ground of his being a resident of another parish. The counsel for the defendant Hypolite Chrétien, urges that nothing is due to the plaintiff; that if any thing was due, he was liable for one half only; and that the action being a joint one, no

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judgment can be given otherwise than contradictorily with both the joint defendants.

The view which we have taken of this case, renders it useless that we should attend to either of the two first grounds of defence. The obligation of the defendants is a joint one, for they bound themselves to do the same thing, and the Civ. Code, art. 2075, provides, that "when several persons join in the same contract, to do the same thing, it produces a *joint* obligation." In every suit on a joint contract, all the obligors must be made defendants (Civ. Code, art. 2080); even where one of them has performed his part of the obligation (Ib. art. 2082); and "the judgment must be rendered, *against each defendant separately for his proportion.*" Ib. art. 2081.

The counsel for the appellee has contended that he complied with all the requisites of the Code in making both the joint obligors parties to the suit, and that the act of the court in dismissing one of the defendants, ought not to be visited on the plaintiff.

To this, the counsel for the appellant has replied, that it does not suffice that all the obligors should be made parties; but it is essential that all should remain in court till judgment is pronounced, for otherwise it cannot be rendered according to the provisions of the Code, in art. 2081. He has relied on the case of *Loussade v. Hartman et al.* 16 La. 119, in which we reversed the judgment, because it was rendered against two obligors only, although four of them were named as defendants in the petition, but not cited. In the case of *Mayor &c. of New Orleans v. Ripley et al.*, 5 La. 120. We affirmed a judgment ordering the discontinuance of a joint suit, on the ground that the plaintiff had discontinued it as to some of the defendants.

This court was so fully impressed, in the case of *Toby et al. v. Hart et al.*, 8 La. 523, with the necessity of all the joint obligors being made parties to the suit, that we thought ourselves authorized by that necessity to create an additional exception to the general rule of the Code of Practice, art. 162, that "one must be sued before his own judge, that is to say, before the judge having jurisdiction over the place where he has his domicile or

residence," and we held that parties contracting joint obligations, may be considered as having waived their personal privilege.

The present case, however, differs from that of the *Mayor &c. v. Ripley et al.*, in this, that in that case the plaintiffs dismissed some of the obligors, and from that of *Loussade v. Hartman et al.* in this, that there the plaintiff neglected to have two of the defendants cited, while the present plaintiff submitted to the decision of the court (notwithstanding her opposition,) sustaining the plea to the jurisdiction of the defendant's co-obligor, whom they had made defendant.

The law leaves to every suitor the right, and the means, of averting an injury which may result to him from any erroneous decisions of an inferior court. If he neglects to exercise that right, and to use those means, he alone is to blame; and he cannot avail himself of his own neglect, to resist the exercise of any right which this neglect may give to the other party. *Unicuique sua culpa nocet.* The plaintiff might have appealed immediately from the interlocutory order sustaining the plea to the jurisdiction, and even after the final judgment he might, perhaps, have appealed and obtained relief.

That the order was an erroneous one, clearly results from our decision in the case of *Toby et al. v. Hart et al.*

It is, therefore, ordered that the judgment be annulled, and that ours be for the defendant and appellant as in case of nonsuit, with costs in both courts.

ANDREW JACKSON PORTER and others v. JOHN MUGGAH and others.

Heirs of age can accept a succession simply, or do acts rendering themselves unconditionally liable. Minors are necessarily beneficiary heirs.

Art. 996 of the Code of Practice, which authorizes actions for debts due from a succession to be brought before the ordinary tribunals, where the heirs, though all or some of them be minors, are in possession of the estate, should, perhaps, be confined either to heirs absolute, or to beneficiary heirs in possession of a succession after it has been fully administered. But where a succession appears to have had but few

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debts, and to have been administered to a certain extent, and to have been in the possession of the widow and heirs of the deceased for several years, an action to recover a debt due by it, may be brought before the courts of ordinary jurisdiction.

APPEAL from the District Court of St. Mary, *Boyce, J.*
Splane, for the plaintiffs.

Crow and *Voorhies*, for the appellants.

MORPHY, J. The plaintiffs to whom there is a balance due of \$1927 63, on two judgments formerly obtained against Edward and James Muggah, as the heirs of John Muggah, represent that James Muggah died some time since in the parish of St. Mary, leaving for his heirs, John Muggah, James Muggah, Henry S. Muggah, David Muggah, Charles R. Muggah, Julia Muggah, and Thomas Muggah, the last four mentioned being minors, represented by their tutor, John Muggah; that the succession of James Muggah has been accepted purely and simply by the said heirs, who have thereby rendered themselves unconditionally liable for the payment of the debts of their ancestor, whose property they are in possession of. After setting up divers matters of defence, the defendants pleaded to the jurisdiction of the District Court. There was a judgment against each of the heirs of James Muggah, for their virile share in one half of the claim of plaintiffs against Edward and James Muggah; and the heirs of the latter have appealed therefrom.

We have had some doubts whether the plea to the jurisdiction of the District Court should not have been sustained, as this case has much analogy to that of Greig, against the same defendants, 11 La. 359. In the latter case, however, James Muggah died during the pendency of the suit against him, and his succession was in the care of an administrator, who was also the tutor of the heirs; whereas, the present suit is brought against his heirs, who are proved to have remained in the possession and enjoyment of the property he left for a number of years. It is true, that the heirs of age could alone have accepted the succession purely and simply, or have done acts rendering them unconditionally liable, because minors are necessarily beneficiary heirs. Art. 996 of the Code of Practice, however, authorizes suits to be brought before the ordinary tribunals, when the heirs, whether all or some of them

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be minors, are in possession of an estate. This provision, which is by no means free from ambiguity when compared with the other articles of the Code on the same subject, should, perhaps, be confined either to heirs absolute, or beneficiary heirs who have come to the possession of a succession after it has been fully administered. 4 La. 202. 5 Ib. 386. Civ. Code, arts. 346, 998, 1006. In the present case, the estate appears to have had but few debts, to have been administered to a certain extent, and to have been in the possession of the widow and heirs of the deceased for several years. Under such circumstances, we think that article 996, above quoted, justifies the bringing of suits before the courts of ordinary jurisdiction. *Saunders v. Taylor*, 6 Mart. N. S. 519.

On the merits, the evidence in the record fully sustains the judgment appealed from.

Judgment affirmed.

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SUCCESSION OF THOMAS E. BOWLES—ALEXANDER L. FIELD,
Curator, Appellant.

Posterior testaments, which do not expressly revoke prior ones, will annul such dispositions in them, as are incompatible with, contrary to, or entirely different from the provisions of the former. Thus, the appointment of one as sole executor, will annul any appointment of another executor made in a previous will.

APPEAL from the Probate Court of St. Mary, *Sallis*, acting J. *Dwight*, for the appellant.

Maskell, and *Lewis*, contra.

GARLAND, J. The appellee, Eleanor Mathison, being authorized by her husband, presented her petition to the Court of Probates, alleging that Thomas E. Bowles had died a short time previously, having made a nuncupative will by public act, in which she was instituted sole heir and universal legatee, and appointed executrix. She prays for the registry and execution of the will, and that letters testamentary may be issued to her. On the same day, the Probate Court decreed according to the prayer of the

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petition, and soon after the executrix was qualified. From this judgment, Field, the curator of the interdicted mother of the testator, has appealed.

In this court the appellant assigns various errors apparent on the face of the record ; but the view we have taken of the case, makes it unnecessary to mention, or to decide but upon one objection.

In another case, which has been submitted to us with this, (*post* p. 33,) Mathison, the husband of Eleanor Bowles, presents to the lower court a petition, stating the proceedings had in this case, and alleging that the testator had made another will, by private act, in Tennessee, where he died, in which said Eleanor is still the instituted heir and universal legatee, but upon conditions different from those specified in his first will, and said Mathison is appointed the sole executor. A copy of the last will, alleged to have been admitted to probate in Tennessee, was presented, and a prayer made for its registry and execution, according to law. This application was granted, and Mathison received letters testamentary. This last instrument he insists is legal and binding.

The tacit revocation of a will, results from some disposition of the testator in a subsequent testament, or from some act which supposes a change of intention. Civ. Code, art. 1684. Posterior testaments which do not, in an express manner, revoke the prior ones, annul in the latter such of the dispositions as are incompatible with, contrary to, or entirely different from the new ones. Civ. Code, art. 1686. By the last will, Mathison is appointed sole executor, instead of his wife. This is such a change in the intention of the testator, as revokes the nomination of Eleanor Mathison, as executrix ; to which, in fact, she seems to have submitted. 12 La. 19. The granting letters testamentary to her was done in error, and the judge, in his judgment according them to Mathison, should have annulled those given previously to his wife.

As the mere recording of a will purporting to have been made by public act, cannot in any way injure the appellant or effect his rights, we see no utility in inquiring into the manner in which it was done. If the party wish to sue to annul the instrument, the fact of the paper being on record presents no obstacle to his doing so.

The judgment of the Probate Court, so far as it orders the ex-

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ecution of the will in question in those parts contrary to the second one, and grants letters testamentary to Eleanor Bowles, is annulled and reversed, and in other respects affirmed ; the appellee paying the costs of the appeal.

SUCCESSION OF THOMAS E. BOWLES—ALEXANDER L. FIELD, Curator, Appellant.

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121	834

The probate of a will is a judicial proceeding, and must be authenticated according to the act of Congress of 26th May, 1790.

The certificate of the clerk of a court in another State, that the transcript "is a true copy from the original filed in my office, as proven in open court, at the October term, 1841, and ordered by the court to be recorded," is not such evidence of the testament having been duly proved, before a competent judge of the place where it was received, as will authorize its admission to probate and execution in this State. It does not show how the will was proved, nor what was the order of the court. Duly certified copies of the orders or decree in relation to the proof and recording of the will, should have accompanied the transcript of the latter.

It is not enough that a clerk certify the result of the action of a court ; he must make copies of what appears on the records, of which he is the keeper.

APPEAL from the Probate Court of St. Mary, *Palfrey, J.*

GARLAND, J. Mathison presented his petition to the inferior court, representing that Thomas E. Bowles, late of the parish of St. Mary, had died in the State of Tennessee ; that previous to his departure from this State he had made a testament, by public act, which had been admitted to probate and ordered to be executed, as will appear by the proceedings had on the petition of Eleanor Bowles, the wife of the petitioner, (*ante*, p. 31). It is further represented, that some time afterwards, Bowles left this State, and while residing in Tennessee made another will, which was duly proved and ordered to be recorded by a competent tribunal of the place where it was made, in which will the petitioner was named sole executor. He presents a copy of the will, and prays that it may be admitted to probate, its registry and execution ordered, and that he be confirmed as sole testamentary executor. Seven days after the filing of this petition, the court ordered the last will to be registered and executed, and that Mathison be con-

Succession of Thomas E. Bowles—Field, Curator, Appellant.

firmed as executor, on his giving bond and security according to law. From this judgment or order, Field, the curator of Dorothea Bowles, has appealed.

The appellant assigns various errors as apparent on the face of the record ; but it is only necessary to notice one objection, which is that the order or judgment of the court in Tennessee, and the proceedings attending or preparatory to the probate of the will, have not been copied and duly certified. The certificate of the clerk, at the bottom of a copy of the will, states that "the above is a true copy from the original filed in my office, as proven in open court, at the October term, 1841, and ordered by the court to be recorded." We have heretofore said, that the probate of a will is a judicial proceeding, and must be authenticated according to the act of Congress. *Balfour v. Chew*, 5 Mart. N. S. 519. *Johnson v. Runnels*, 6 Mart. N. S. 622. The court in Tennessee no doubt made some order or decree in relation to the proof and recording of the will, and some proceedings were, of course, had, preparatory to the same. Duly certified copies of these should have been sent with the copy of the instrument. It is not sufficient that a clerk certify the result of the action of a court ; he must send copies of what appears in the records, of which he is the keeper.

That has been omitted in this case, and we think the court below erred in receiving the copy, and ordering it to be registered and executed. Article 1682 of the Code says, that the order of execution shall be granted without any other form, if it be established that the testament has been duly proved, before a competent judge of the place where it was received ; otherwise, the testament cannot be carried into effect, without being first proved before the judge of whom the execution is demanded. It does not appear in what manner the will was proved in Tennessee, nor what was the order of the court of Montgomery county. We, therefore, cannot say whether it was duly proved before a competent tribunal, or not.

The judgment of the court of Probates is therefore annulled and reversed, the order to register and execute the will of Thomas E. Bowles deceased, is set aside, and the case remanded for further proceedings according to law, with directions to notify the appellant of the time and place of any further proceedings to be had in

Succession of Thomas E. Bowles—Field, Curator, Appellant.

relation to the registry and execution of the testament; the appellee paying the costs of the appeal.

Dwight, for the appellant.

Maskell and Lewis, contra.

SUCCESSION OF THOMAS E. BOWLES—ALEXANDER L. FIELD, Curator, Appellant.

Notice must be given to the forced heirs, of any application to sell the property of a succession in which they are interested. It may be to their interest to prevent a sale, by furnishing the means necessary to extinguish the debts and legacies.

The heirs should be informed of every act of an executor or creditor, which may charge or materially affect the property of a succession.

An application by an executor for authority to sell a part of the effects of a succession, is in the nature of a rule to show cause; and it is only necessary that reasonable notice thereof should be given to the parties interested.

APPEAL from the Probate Court of St. Mary, *Palfrey*, J.

GARLAND J. The appellee, Simon C. Mathison, executor of Thomas E. Bowles deceased, presented his petition to the Court of Probates, alleging that, after waiting the time required by law, he thinks from the amount of the debts made known to him, it will be necessary to sell a part, if not all of the property belonging to the succession, to pay the debts due by it, and effect a partition which had been prayed for by one of the parties interested. He prays that a sale be ordered, on such terms as shall be fixed by the parties interested, that Field be notified of the application, and be ruled to show cause why the property should not be sold. The Probate Judge ordered the petition to be notified to the parties interested therein. A citation issued accordingly, directed to Field, as curator of the forced heir of the testator. This appears from the record not to have been served on him; yet the court proceeded to give judgment, ordering a sale of the whole succession, to take place as soon as might be, after a family meeting could be held to deliberate on the terms and conditions. A family meeting was ordered in relation to the interests of the interdicted heir. From this judgment, Field, the curator, has appealed.

The appellant has assigned as errors apparent on the face of the record :

First. That no citation or notice of the application for a sale, was ever served on the presumptive heirs, nor on the appellant.

Second. That no judgment by default was taken, nor appearance made, nor issued joined.

Third. That the legal delay was not allowed, before judgment was rendered

Fourth. That there are no reasons given for the judgment.

We shall consider the three first objections together. Article 1660 of the Civil Code, makes it the imperative duty of the executor to have the presumptive heirs present, and the counsel for the absent heirs notified to attend at the taking of an inventory.

Article 935 of the Code of Practice requires in certain cases, (perhaps in all,) that notice be given to the presumptive heirs to attend at the opening and proof of a will. Notice must be given of the application to appoint a dative executor (18 La. 395) ; and we think very strong reasons exist, why the forced heir, at least, should be notified of an application to sell the succession in which he is interested. Article 1661 of the Code only authorizes a sale in default of funds to pay the debts and legacies ; and a certain order is prescribed in which the property shall be sold, for that purpose. Article 1662 says that, except for the above named purposes, the executor cannot cause the immoveables and slaves employed on the plantation to be sold, unless authorized by the will. The heir should be notified of a deficiency of funds to pay the debts and legacies, as it may be in his power, and to his interest, to furnish the money necessary to discharge the demands on the succession, and prevent a sale. Other reasons might be given, why the heir should be informed of those acts of the executor or creditors, which materially affect the property, and sometimes entirely change its character.

It seems that the parties were aware in this case, that it was necessary to give notice of the contemplated proceedings, and that they were ordered by the judge to do so. Why the notice or citation which was issued, was not served on the appellant, is not explained. The error appears to be fatal.

The objection, that there was no judgment by default, or

Succession of Thomas E. Bowles—Field, Curator, Appellant.

delay afterward allowed, before rendering a judgment, we do not think entitled to any weight. Such applications as the one under consideration, are in the nature of a rule to show cause why the act should not be done. It is only necessary that reasonable notice should be given to the parties interested. We do not think that any default was necessary, or that useless delays should be allowed after the parties have been heard.

It is unnecessary to notice the fourth ground of error.

The judgment of the Probate Court is reversed, and the case dismissed with costs in both courts.

Dwight, for the appellant.

Maskell and *Lewis*, for the executor.

SUCCESSION OF THOMAS E. BOWLES—ALEXANDER L. FIELD, Curator, Appellant.

APPEAL from the Probate Court of St. Mary, *Palfrey*, J.

GARLAND, J. The appellee, Mathison, executor of Thomas E. Bowles, deceased, presented his petition, alleging that from the amount of the claims against the succession which he represents, and in consequence of the recommendation of a family meeting, held that day, touching the interests of Dorothea Carlin, the interdicted mother and forced heir of his testator, it is for the interest of all parties concerned, that a meeting of the creditors should be called, to deliberate on the terms and conditions of a sale of the property. He, therefore, prays that certain creditors, whose names he furnishes, may be cited for the purpose stated, and that a sale of all the estate may be made on the terms and conditions to be fixed by the creditors, so far as they are concerned, and that for the balance it may be on the terms specified, in a petition previously filed for a sale to effect a partition. On the 13th January, 1842, the day on which this petition was filed, the judge ordered that a meeting of creditors should be convened at a future day, in conformity with the prayer of the petition; and again ordered that a sale should be made of all the

 Field v. Mathison, Executor.

property of the succession, on terms to be fixed by the creditors. From this judgment, Field, the curator of the forced heir, has appealed.

The only document or evidence that comes up with the record, is the petition of the appellee, asking for a partition of the succession between his wife Eleanor Mathison, the universal legatee, and her mother, the forced heir; and the judge certifies that this petition, and a list of names of certain persons stated to be creditors, are all the evidence on which the cause was tried.

The same errors were assigned as apparent on the face of the record in this, as in the case just decided, (*ante*, p. 35,) with the additional one, "that from the showing of the appellee, he has no right to institute the action of partition stated in his petition." This record exhibits no judgment on the petition for a partition. Having, in the preceding case, decided all the questions involved in this, against the appellee, on the ground of a want of notice, we must come to the same conclusion.

The judgment of the Probate Court of the 13th of January, 1842, is, therefore, annulled, and the petition dismissed with costs.

Dwight, for the appellant.

Maskell and Lewis, for the executor.

 LOUISA FIELD v. SIMON C. MATHISON, Executor.

The testator had bequeathed all his estate to his mother and one of his sisters. An order for a sale of the property having been procured by the executor, a sister of the deceased, to whom no part of the estate had been left, obtained an injunction to prevent the sale, and the curator of the testator's mother, an interdicted person, intervened in the suit, alleging that the latter was a forced heir recognized by the will, that the injunction was for her benefit as well as the plaintiff's, claiming part of the damages sued for, and praying to be allowed, with the consent of the plaintiff, to unite with the latter, and to pay a part of the costs. Answer by defendant to the petition of intervention, denying the right of the curator to intervene; and judgment dissolving the injunction and ordering the executor to proceed with the sale. On an appeal by plaintiff and intervenor: *Held*, that the plaintiff, having no interest in the succession of the testator, had no right to interfere with its administration: and that no judgment having been rendered for or against the intervenor in the lower court, his appeal must be dismissed.

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49	1137
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APPEAL from the Probate Court of St. Mary, *Dumartrait*, J.

GARLAND, J. The plaintiff, who is a sister of Thomas E. Bowles, alleges that she is entitled to a portion of his succession, which amounts to about \$35,000; that Mathison, claiming to be the executor of her deceased brother, has taken possession of all the property, and obtained from the court two orders or judgments, decreeing a sale of the same, under which judgments, dated December the 29th, 1841, and January 13th, 1842, the property is advertised to be sold on the 21st of February, 1842. The petitioner alleges the nullity of these judgments or decrees of the Court of Probates.

First. Because she is a presumptive heir, and has had no notice of any of the proceedings upon which said judgments or orders have been rendered; she having never been cited, having never appeared or joined issue, nor had a judgment by default taken against her.

Second. Because there is nothing to show that the creditors of the estate demanded a sale.

Third. Because it does not appear necessary to sell the property to pay the debts of the estate.

Fourth. Because if it be necessary to sell any of the property to pay the debts, it is not necessary to sell the whole of it.

Fifth. On the ground that no property ought to be sold to pay the debts, until the proceeds of the sugar and molasses made on the plantation of the deceased, (which are not put on the inventory,) shall have been applied to that purpose.

She further alleges that the sale ordered should not take place, in accordance with the resolutions of the meeting of the creditors, as she has made opposition to the homologation of those proceedings; and, further, because the sale, if made in conformity to the decision of said meeting, will be a great injury to the estate.

She prays that the aforesaid orders or judgments directing a sale, may be annulled and declared void; and for an injunction against Mathison, and all others, to prevent a sale, saving to him the right of having so much of the property sold as may be sufficient to pay the debts of the succession; and she prays for damages, &c.

Upon this petition an injunction was issued, arresting all further proceedings.

The defendant, after a general denial, specially denies that the plaintiff has any interest in the estate of Thomas E. Bowles, as she is not named as a legatee in his will. He avers that the proceedings of the family meeting and meeting of creditors, have been duly homologated, and a sale ordered to pay the debts, which amount to about \$14,000, mostly secured by mortgages, and that the sale has been illegally enjoined; wherefore, he prays for damages, for a dissolution of the injunction, that he may be directed to proceed to the sale of the property as if no injunction had been issued, and that he have judgment on the injunction against the plaintiff and her sureties.

On the day that this answer was filed, Thomas Maskell, the attorney of the respondent, presented a petition, alleging that he was, in a representative capacity, as curator of the estate of one Key, a creditor of the estate of Bowles; and that a sale had been ordered to pay his, and other debts. He asks leave to intervene in the suit, and says that the injunction ought not to have issued, and should be set aside.

First. Because the plaintiff has no right to it.

Second. Because the plaintiff has no interest in the estate until the debts are paid, although she may be a presumptive heir, which is denied.

Third. Because, as she could not interfere, he has suffered damages to a large amount. Wherefore he asks a judgment, dissolving the injunction, and for damages. On the same day Field, as the curator of Dorothea Bowles, presented himself, and asked to intervene and assist the plaintiff, alleging the same grounds of objection and nullity, and asserting that Dorothea Bowles was a forced heir, recognized by the will, that the injunction was for her benefit as well as the plaintiff's, and claiming a part of the damages sued for. He prays to unite with the plaintiff to pay a portion of the costs, and to share the benefits; to all which it is stated the plaintiff has agreed. This petition was answered by the defendant, but on that of Maskell no issue was ever joined.

After a protracted trial, the court dissolved the injunction, and

ordered the defendant, as executor, to proceed to a sale of the succession as if no injunction had been issued or attempt made to annul the judgments ordering a sale, which are declared valid and good in law. From this judgment, the plaintiff, and the intervenor Field, as curator, have appealed.

Dwight, for the appellants.

Lewis, contra. The plaintiff is without interest in the succession. She cannot interfere with its administration. The testator having disposed of all his property, her remedy, if any, was by an action of nullity to set aside the will. The intervention, being an accessory to the principal action, must share its fate.

GARLAND, J. On the trial of the cause, the two wills of Thomas E. Bowles, mentioned in the case of the *Succession of Thomas E. Bowles*, ante, p. 33, were given in evidence, and their validity or legal effect was not in any manner attacked, either by the pleadings or evidence. It is not pretended that these wills, or either of them, have been impeached in any legal manner; and from them, as they now stand, it is clear that Louisa Bowles has no right or interest in the succession of her deceased brother, he having, in express terms, given all his estate, real and personal, to his mother, and sister, the wife of the defendant. As long as these testaments stand, the plaintiff has no right to interfere in the administration of the succession of her brother. She is a collateral heir only, and the testator had a right to give his property to whom he pleased, so that the rights of his mother were preserved. The presumption of the plaintiff being an heir, is destroyed for the time being, by the will having instituted other persons as the universal legatees, or legatees by a universal title. Not having any interest in the case, the injunction was, therefore, properly dissolved.

The appellant, Field, insists that, although the injunction may have been properly dissolved as to the plaintiff, for want of interest, his appeal ought to be maintained, and he be permitted to assume the place of the plaintiff, and show the propriety and legality of the injunction, though originally no party to it, and although he had given neither bond or security to indemnify the defendant, nor made oath to the facts necessary to obtain it, because he had chosen to join her and claim a part of her alleged rights. Inde-

Mathison, Executor, v. Field and another.

pendent of the objections that might be made to this assumption or transfer of litigious rights, there is one still more formidable as regards the appeal of the intervenor. There has been no judgment either for or against him, on his petition, in the inferior court. He is there still, and cannot, by hanging to the skirts of the plaintiff, get into this court and assert his rights under the protection of one whom we have already excluded.

The judgment, so far as it dissolves the injunction, is affirmed, at the costs of the plaintiff without prejudice to any rights which she may have on the estate of Thomas E. Bowles; and as to the intervenor, Field, as curator of Dorothea Bowles, his appeal is dismissed with costs.

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SIMON C. MATHISON, Executor, v. LOUISA FIELD and another.

Where, through error, an order has been made allowing a suspensive appeal on security for costs only, and no transcript of the record has been delivered to the party, the order may be rescinded by the lower court on a rule to show cause.

APPEAL from the Probate Court of St. Mary, *Dumartrait, J. Maskell and Lewis*, for the plaintiff.
Dwight, for the appellants.

GARLAND, J. The petition alleges that on the 1st of July, 1842, a petition and citation of appeal in the name of the defendants, were served on the petitioner, by which it appeared that they had taken a suspensive appeal, from a judgment of the court between the same parties, dissolving the injunction in the case of *Field v. Mathison, Executor*, just decided, (*ante*, p. 38,) on giving bond and security in the sum of \$200. He represents, that this is not in compliance with articles 575, 576, and 577 of the Code of Practice, and alleges that the appeal is illegal, and ought to be set aside. He prays that the defendants in the rule, may be ordered to show cause why the suspensive appeal should not be set aside, or bond and security given as required by law.

The defendants except to answering the rule, on the ground that the court has no jurisdiction of the question, the Supreme

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Court of the State being the only tribunal that can try the question, and decide whether the appeal was properly taken, or not; and ask that the rule be dismissed. On the trial, the court ordered the appeal to be set aside, so far as it is suspensive, unless the appellants should give bond and security in the sum of \$3,500, within ten days from the date of its judgment. From this judgment, the defendants in the rule have appealed.

It appears that the judgment dissolving the injunction, was signed on the 15th of June, 1842, and a motion for a new trial overruled on the same day. The petition of appeal was presented, and the order granted by the judge on the 30th of the same month; and served on the appellee the next day. On the 2d of July, the application for the rule was filed, and served on the appellants on the 5th of the same month.* These are all the material facts of the case, but the parties have made up a record of about 150 pages, nearly all of irrelevant and useless matter, (as they have in two other cases, relating to the same estate,) with no other object, that we can discover, than to increase the costs.

As it respects the parties, the case is now not one of much importance; the plaintiff in the rule, and appellee in the other case, having succeeded in having his judgment affirmed as to one appellant, and the appeal dismissed as to the other. *Field v. Mathison, ante*, p. 38. But it is clearly a case in which the plaintiff was entitled, at the time, to some relief. The ten days allowed by article 578 of the Code of Practice, within which a suspensive appeal could be taken, had expired. The Probate Judge, from error or inadvertence, had, on an *ex parte* application, made an appeal suspensive, when he was forbidden by law to do so. The next day the plaintiff being notified of it, took measures as soon as possible to have the error corrected. The record and all the papers were still in the possession of the clerk. It does not appear that any transcript had been made out and delivered to the party, nor was the case filed in this court. The present is widely

* The rule was served on the same day, and the application for the rule was on the eighth, and not on the fifth of July. The record does not show that any notice of the judgment dissolving the injunction had been served on the plaintiffs in that case, previous to the time, (30th of June,) when their petition of appeal was presented.

Mathison, Executor, v. Field.

different from any case that has heretofore come before us ; and we are of opinion, under its peculiar circumstances, that relief should be extended.

Judgment affirmed.

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SIMON C. MATHISON, Executor, v. ALEXANDER L. FIELD.

A partnership is dissolved by the death of one of the partners ; and the property must be divided as soon as practicable, unless there be some stipulation to the contrary. The representative of a deceased partner may take the necessary measures to protect the interest of the partner he represents ; but he cannot administer the partnership affairs, unless authorized to do so by the contract of partnership.

APPEAL from the Probate Court of St. Mary, Dumartrait, J.

GARLAND, J. Some years previous to the death of Thomas E. Bowles, of whose succession the plaintiff claims to be executor, he, with the consent of a family meeting, entered into a partnership with his interdicted mother, Dorothea Bowles, who was represented by a special curator for that purpose, in the business of sugar planting. The property belonged principally to the mother, but the son was to have the entire management of it during the partnership. It was stipulated that each should retain a title to the property put by them respectively into the partnership, and that the share of Bowles (the son,) should be four-ninths of the revenue, but no division of the revenue was to be made until the partnership debts were paid ; and he was to render an annual account of the income and expenses to the parish judge. This partnership existed at the time when Bowles died, in the summer of the year 1841, when a crop was growing on the plantation. In August of that year, a family meeting of the relatives of the interdicted person was held, which recommended that the defendant should be appointed her curator in the place of her deceased son and partner ; and, in relation to the property, advised that the whole should remain together, until the crop was made up, or until the 1st of January, 1842, in possession of Mathison's wife, who was then acting as executrix of her brother's (Thomas E.

Bowles') succession, when ten hogsheads of sugar, under the direction of a special curator, should be sold and the proceeds applied to the expenses of the plantation, if they amounted to so much; the remainder of the crop of sugar, molasses, and corn, then to be divided in the manner agreed on in the contract of partnership, between Field, the curator of Dorothea Bowles, and the executrix of Thomas E. Bowles. The former was then to take possession of all the property of his ward. These proceedings were homologated by the Probate Court, and Mathison's wife proceeded to act under them for some time. Having attempted to remove or dispose of some of the sugar, she was arrested by a sequestration, obtained by Field, and twenty-five hogsheads were taken possession of by the sheriff, and bonded by her. This suit was dismissed at the plaintiff's cost, and Mathison, who had become executor, was decreed to retain possession of the sugar. On the 6th of January, 1842, another family council was held, at the instance of Mathison, or in consequence of his proceedings, and among other things, they advised that the crop of sugar should be divided in kind, in the proportions fixed by the act of partnership, and prescribed the mode in which the lots were to be drawn. Mathison had previously presented a petition, praying, on behalf of himself and his wife, for a partition, and asking it to be effected by a sale. These proceedings were homologated in the same manner as the first, and Mathison makes them immediately the basis of an application for a meeting of creditors, to fix the conditions of a sale of his testator's property.

In obedience to the advice of the family meeting, and the confirmation of their proceedings by the court, the judge gave Mathison notice, that he should, on a day fixed, proceed to make the partition in kind between him and the defendant; whereupon Mathison presented his petition, praying the judge to arrest the execution of the judgment of partition, alleging: *First*. That the family meeting had assumed powers not authorized by law, as they had ordered and decreed, that a judicial partition of the crop of sugar and molasses belonging to the partnership, should be made in kind.

Second. That the proceedings are illegal, unjust and oppressive, and were "got up" for the purpose of depriving him of the legal

possession of the sugar and molasses, and of his right to dispose of the same, and of rendering his account, according to the act of partnership.

Third. That the partition would deprive him of the possession and enjoyment of the property ; all of which he alleges to be to his damage \$500.

He then sets forth the pendency of the suit for a sequestration, an application made by Field on the day of the family meeting, (6th January, 1842,) for a partition, of which he says he had no notice, and finally avers, that no judicial partition of the sugar and molasses can be made in kind, but that the same must remain in his possession, that it may be disposed of by him, and an account rendered, as was done by his testator.

In addition to the prayer for an injunction, the plaintiff asked that he might be decreed to be the lawful possessor of the sugar and molasses ; to be authorized to sell the whole of it ; and to account for the proceeds as executor of the deceased partner.

After hearing the parties, the court made the injunction perpetual, and decreed the plaintiff to be "the true and lawful owner and possessor of the crop of sugar and molasses belonging to the partnership, as by him claimed ; that a writ of possession issue immediately ; and that the crop be sold by the plaintiff and accounted for, as had been previously done by the deceased partner." From this judgment the defendant has appealed.

We are of opinion that the judge erred. He exceeded his jurisdiction in undertaking to decide upon the ownership of the property ; and, after examination, we see no ground for the injunction.

The first ground alleged by the plaintiff, is unsupported by the facts. The family meeting was convened to deliberate and advise "upon the interest of said interdicted, as connected with the succession of the late Thomas E. Bowles." They assumed no authority, nor did they give any judgment of partition ; they advised what was best in their opinion, and recommended a partition of the crop in kind. The plaintiff, in his petition, filed December 15th, 1841, asked for a partition of the estate held in common between his wife and her mother, and asked that the defendant

might be cited to show cause why it should not be so decreed. In his petition for the injunction he says, that the defendant had prayed for a partition of the sugar and molasses in kind; which he seems to think very improper. The Court of Probates, by homologating the deliberations of the family meeting, and not *that* body, gave the judgment of partition.

As to the second allegation, we see nothing illegal or unjust in the proceedings. If they were instituted for the purpose alleged, the plaintiff is, in a great degree, the author of the mischief. He was the first to seek a partition. He preferred a sale to effect it; but his wishes and interest are not to control all others, and if a partition deprives him of the possession of five-ninths of the sugar and molasses, it only takes from him that to which he has no right.

The third allegation is answered by what we have said on the second.

As to the fourth allegation, we are unable to discover why sixty-eight hogsheads of sugar and a quantity of molasses, cannot be divided in kind; and the plaintiff has given no other reason why it cannot, or ought not to be so divided, than that it will deprive him of five-ninths of the property, and prevent him from getting the proceeds into his possession. He is entirely mistaken in supposing that he has the same rights over the partnership property that his testator had. The partnership was dissolved by the death of one of the partners, (Civ. Code, arts. 2851, 2852,) and the property must be divided as soon as it can be, unless there be some stipulation to the contrary. *Ib.* art. 1137. There might be some plausibility in a surviving partner, or his legal representative, claiming the possession and right to sell the partnership property, and the Code (arts. 1131, 1132,) authorizes it under some circumstances and upon conditions which are stated; but the assumption that the representative of the deceased partner can, at his pleasure, take the ownership and possession of the partnership property from the survivor, is unsustained by reason or authority. The representative may take the necessary measures to secure the interest or share of the partner he represents, but he cannot administer the partnership affairs, unless authorized to do so.

Kohn and another, Syndics, v. Marsh.

The judgment of the Court of Probates is annulled, and the injunction dissolved; the plaintiff paying costs in both courts.

Maskell and *Lewis*, for the plaintiff.

Dwight, for the appellant.

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JOACHIM KOHN and another, Syndics, v. JONAS MARSH.

Petition by the syndics of an insolvent for a division of partnership property by sale.

Four experts having been appointed, by consent, to report whether the property could be divided in kind, without loss or inconvenience, and two only having reported, on motion of plaintiffs the order appointing experts was rescinded, and the court proceeded to receive other evidence of the facts intended to be established by their report. *Held*, that the report of the experts was not the only mode of proof to which the court might resort, to enable it to decide whether the property should be sold; and that, under art. 1261 of the Civil Code, any other legal evidence might be received.

Any consent given, or admission made on record, by a party, in the progress of a suit, from which his adversary may derive any legal right, cannot be withdrawn without the consent of the latter, who is entitled to the benefit of its full legal effect. *Aliter*, where such consent or admission confers no right, as where experts have been appointed, by consent, to ascertain a fact, in which case either party may move to rescind the order, or it may be done by the court *ex officio*.

Where, in an action for the settlement of a partnership, the property is such as cannot be divided in kind without loss or inconvenience, a sale may be ordered at once, without waiting for the settlement of the partnership accounts.

APPEAL from the District Court of St. Martin, *King*, J.

Voorhies, for the plaintiffs.

I. E. Morse, for the appellant.

SIMON, J. The defendant is appellant from a judgment ordering the sale, at public auction, of a plantation and slaves belonging to the partnership heretofore existing between himself and John F. Miller, whose syndics have instituted the present action with a view to obtain a partition and settlement thereof.

The pleadings show that after this suit was put at issue, an order was rendered by the inferior court, appointing a notary to make an inventory of all the property in partnership, and referring the settlement of all the accounts set up by the partners against each other, and against the partnership, to three auditors. This

first order was followed by another, rendered by consent of parties, appointing four experts, for the purpose of reporting whether the plantation and property specified in the inventory, could be, without loss or inconvenience, divided, in kind, into two lots. At a subsequent term of the District Court, two of the experts only made a report, and gave it as their opinion that the property inventoried could not be divided in kind, without great inconvenience or loss, or a diminution of its value. After the filing of this report, the case was taken up, and the court permitted the plaintiffs' counsel to produce evidence to prove the facts intended to be established by the report of the experts. This was excepted to by the defendant's counsel. The evidence, however, was admitted, after the order appointing the experts had been rescinded on motion of the plaintiffs' counsel, to which the defendant's counsel had previously excepted, on the ground that the order appointing experts having been rendered by consent of parties, the same could not be rescinded without their consent.

After the evidence was closed, the plaintiffs' counsel moved the court to order an immediate sale of all the partnership property to be made at public auction, in order to effect a partition thereof, to which motion the defendant's counsel objected, on the ground that there were long and intricate accounts unsettled between the parties, which accounts had been referred to auditors, who had not yet reported thereon, and that a sale could not be legally ordered until the accounts should have been settled and liquidated, and the balance between the parties ascertained. These objections were overruled by the judge *a quo*, who sustained the plaintiffs' motion, and ordered the sale accordingly. To this opinion, the defendant's counsel excepted, and from the interlocutory judgment rendered thereon, he took the present appeal.

The first question to be decided in this case, grows out of the defendant's bills of exception. It is whether the inferior court could properly and legally rescind the order appointing experts, and permit the plaintiffs to introduce evidence to prove the facts sought to be established by the report of the experts; or, in other words, whether the report of the experts, legally made, was not the only proper evidence of the fact intended to be proven in this case.

Art. 1261 of the Civil Code provides, that "when the property to be divided is indivisible by its nature, or when it cannot be conveniently divided, the judge shall order, at the instance of any one of the parties, on proof of either of these facts, that it be sold at public auction, &c." From the words of the law, it appears to us manifest that the report of experts is not the only mode which may be resorted to, to bring to the knowledge of the court the facts upon which the judge is to decide, whether there shall be a sale of the common property or not. The only object of the law is, to afford to the court sufficient means to ascertain the circumstances upon which its decision is to be based, and it matters not by what kind of proof the knowledge of such facts is acquired, provided it be by legal evidence. It is clear that, as soon as the judge is made legally acquainted with the true nature and state of the common property, it is his duty to order a division thereof according to the best interests of the parties, and in the manner pointed out by law; and we are unable to see any reason why he should be obliged to delay his judgment, until a report is made by experts, when the same result or proof can be reached by other and equally sufficient evidence.

But it is contended that, in this case, the experts were appointed by consent of parties; that such consent cannot be withdrawn; and that their report was, consequently, to be used as the only proper and legal evidence of the facts sought to be established. It is true that the order in question was rendered by consent, and that two of the experts had acted and made a report agreeing with the evidence which was subsequently introduced by the plaintiffs. The order appointing experts was rescinded by the court on the motion of the plaintiffs, who, thereby, withdrew the consent they had previously given. It is a well known and established rule that where one of the parties to a suit gives a consent or makes an admission on record in the course of the suit, from which certain legal rights may be derived in favor of his adversary, he cannot subsequently withdraw such consent or admission; and that the other party is entitled to the benefit of their full and legal effect. In this case, we are at a loss to conceive how the defendant could be said to have acquired any legal right from the consent of the plaintiffs to the appointment of experts for the purpose of proving

a fact. The withdrawing of such consent could not, in any manner, be injurious to his interest; it only went to selecting one mode of proof instead of another. It cannot be construed as a waiver or renunciation of any legal right; and we know of no law by which the plaintiffs could be bound to resort to one kind of proof in preference to another, or which would preclude them from introducing the whole of their evidence, if legal, or from selecting such parts of it as they thought proper. If the mode of proof, originally consented to by the plaintiffs, was afterwards found to be inconvenient or insufficient, they were at liberty to withdraw their consent, and to move the court to rescind the former order, no legal right having been thereby acquired by their adversary. The district judge himself could have done it, *ex officio*.

The main point, however, which this case presents, and which has been ingeniously and strenuously urged by the defendant's counsel, is, that no sale of the common property could be ordered, before the accounts between the parties against each other and against the firm were settled and liquidated. We have attentively considered this question, and have found no difficulty in coming to a conclusion adverse to the appellant's pretensions. The object of this suit is a settlement and partition of the partnership formerly existing between the parties. In order to arrive at a final liquidation of it, it is necessary, since the property cannot be divided in kind, that the whole of it should be converted into money, not only to satisfy the debts, but also to divide the proceeds of the sale between the partners, according to their rights against the firm, and to the portions to which they may be entitled respectively. How could a fair settlement and final liquidation be made, if the amount of the assets or credits of the partnership are left unknown? These are mainly to be taken into consideration by the auditors or by the notary; and it would be vain to say that there should be a provisional settlement made before selling; that the sale should be delayed until the balance due to, or by each of the partners should be ascertained; and that a final liquidation should take place subsequently. *No one can be compelled to hold property with another* (Civ. Code, art. 1215); and it would often happen that, by the delay which the settlement of the accounts of the partners would necessarily occasion, this rule of law would

become vain and nugatory. This, our law does not seem to have ever contemplated. On the contrary, from the different provisions of the Code on the subject, it is evident that the intention of the law maker was to include in the settlement or liquidation all the objects concerning the partnership, and all the property belonging thereto, or the proceeds of such as it was necessary to sell to effect a partition. Art. 1278 of the Civil Code says, positively, that the *active mass* shall be composed "*of the price of the moveables, slaves, and real estate which have been sold to effect the partition.*" From this article, as well as from article 1272, and particularly from the words of articles 1265 and 2603 of the Civ. Code, we cannot hesitate to say, that before ascertaining what balance there may be in favor of or against the partners respectively, it is required that the property which cannot be divided in kind, should be first sold and converted into money, so that the proceeds thereof may be included in the *active mass*. This appears to be the true meaning of our law on this subject.

We think, therefore, that the judge *a quo* did not err in ordering the sale of the common property in this case; and that, as directed in the judgment appealed from, the proceeds thereof should not be divided between the parties, until a final settlement and liquidation of their accounts be made, and their portions ascertained, by a partition made under the control of the inferior court.

Judgment affirmed.

ANNE PERRETT and Husband v. ANTOINE DUPRÉ and others.

A lessor is bound to keep the premises in a condition fit for the purposes for which they were leased. If he fail to make the repairs necessary during the lease, the tenant may make them himself, and deduct the amount from the rent.

The lessor is bound to indemnify the lessee, for all damage sustained by the latter in consequence of the vices and defects of the thing leased, though the lessor knew nothing of the existence of such vices and defects at the time of the lease, and even where they have arisen since.

Where, after the commencement of a lease, the house becomes so much injured as to

Perrett and Husband v. Dupré and others.

be incapable of being rendered fit for the purposes for which it was leased, otherwise than by rebuilding it, and the lessor offers to dissolve the lease, which the lessee refuses, and continues to occupy the building: *Held*, that the lessor will not be responsible for any damage subsequently sustained by the lessee in consequence of the condition of the building, and that the latter will not be entitled to claim any diminution of the rent for the period he continued to occupy the premises after the offer of the lessor to annul the lease.

In an action for the rent of a building occupied as a shop by a commercial partnership, the judgment must be against the lessees *in solido*.

APPEAL from the District Court of St. Landry, *King, J.*

MORPHY J. At the last September term, this court affirmed a judgment, decreeing the defendants to pay two instalments of rent due to the plaintiffs for a brick store and out-houses leased to them in the town of Opelousas, and pronouncing a dissolution of the lease. See 19 La. 343. The plaintiffs, in two suits, which have since been consolidated, now claim the three semi-annual instalments, which became due from the 15th of September, 1840, to the 15th of March, 1842. The defendants aver that the lease under which the plaintiffs, claim has been annulled; that the plaintiffs have not complied with the terms of the lease, and have not kept the property in such a condition as they were bound to do; that part of the premises consists of a large brick house, which has always been used as a store, and in which they always had a large stock of goods on hand; that without any fault of theirs, the house has for a long time been in a state of decay and dilapidation, the walls and roof being cracked in many places, so that the rain and wind pass freely through, whereby the goods in the store have been injured to the amount of \$1000. They aver that they gave notice to the plaintiffs of the deterioration of the house, and requested them to cause it to be repaired, which they have neglected and refused to do; that by reason of the said cracks the house has lost much of its usefulness and value, and has not been so well fitted for the use for which it was leased as it was before; that the plaintiffs, by failing to repair the house as they were bound to do, are liable to suffer a diminution of rent to the amount of \$500 per annum, and to pay \$1000 damages. There was a judgment below, in favor of the plaintiffs, for \$1415, and the defendants have appealed.

The facts of this case are materially the same as those pre

sented by the record in the first suit, very little additional evidence having been introduced.

It is undoubtedly the duty of the lessor of a house to keep and maintain it in a condition to be used for the purpose for which it is leased; if he fails to make all necessary repairs during the continuance of the lease, the tenant is, by law, authorized to cause them to be made himself, and to deduct the amount expended in making them, from the rent due. It is equally true that the lessor is bound to indemnify the lessee, for all damages sustained by the latter in consequence of the vices and defects of the thing leased, even if he knew not of the existence of such vices and defects at the time the lease was made, and even when they have arisen since. Civ. Code, arts. 2662, 2664, 2665. But in the present case it is proved that the house leased was in such a situation as not to be susceptible of being repaired. The opinion of the workmen, consulted by both parties to this suit, was, that the house must be pulled down and entirely rebuilt, as the foundation had given way and sunk, and the walls had cracked in several places. As soon as the impracticability of repairing the house was ascertained, a dissolution of the lease was tendered to the defendants; but they refused it, and continued to occupy the premises. Though the house had really become unfit to be used as a store, yet, as it was known to the defendants that it could not be repaired, and that they were at liberty to leave it, they complain with bad grace, of having suffered damages which it was in their power to avoid. But the evidence shows that the loss of the defendants, if they suffered any at all, was extremely small. One of the defendants' clerks testifies, that some goods in a small room below were injured by the leaking of the house, but they did not sustain much damage, as he was always careful to remove them; that he supposes the damage to have been about twelve per cent; that there might have been about \$300 worth of goods on the side of the room where the leak existed; that a quantity of stockings and socks were wet, &c. On the last trial, no attempt was made to prove any other damage to the stock of goods in the house; and that spoken of by this single witness, appears to have been sustained after the defendants had refused

The State v. Linton.

to leave the house. *Volenti non fit injuria*. It appears from the whole testimony that there was more apprehension entertained by the tenants and their clerks, lest the house should fall over their heads, than real inconvenience felt or injury sustained from the crazy condition in which it was.

As to the diminution of rent claimed by the defendants for the time they continued to occupy the premises, after the plaintiffs' offer to annul the lease, we do not think them entitled to any. They clung to the possession of the property as long as it suited their convenience, and, by appealing from the judgment dissolving the lease, put it out of the power of the owners to oust them before the judgment was affirmed in September last. It was only a short time after, that they surrendered the premises. Having thus withheld the property, by suspending the effect of the judgment dissolving the lease, and continued to use it as before, they should, in our opinion, continue to pay the same rent. The appellees have prayed for an amendment of the judgment, which they contend should have been joint and several against the defendants, who are commercial partners.

It is, therefore, ordered, that the judgment appealed from be amended, so as to be rendered joint and several against the defendants; and that it be affirmed, with costs, in all other respects.

Swayze and Taylor, for the plaintiff.

T. H. Lewis and W. B. Lewis, for the appellants.

THE STATE v. BENJAMIN F. LINTON.

The penalty imposed by the eighteenth section of the act of 7th June, 1806, on the owner or occupier of a plantation, for keeping slaves thereon, without a white or free colored person as manager or overseer, can only be recovered by civil action before an ordinary tribunal. The action must be brought before a Justice of the Peace, a Parish, or District Court, according to the number and amount of the fines claimed. Where the act which imposes a fine prescribes that it shall be recovered by a civil action, the officers of the State cannot, by instituting a suit in the form of an indictment, deprive the party of the right of appeal to the Supreme Court.

INDICTMENT stated that Benjamin F. Linton, was the owner of

a plantation in the parish of St. Landry, on which he had kept a certain number, to wit, ten slaves, since the 1st of January, 1841, till that time, (November, 1841,) without having any white or free colored person as manager or overseer of such slaves, contrary to the form of the statute, &c. Plea, not guilty. The evidence established the allegations of the indictment; and the District Court of St. Landry, *King, J.*, gave judgment against the defendant for fifty dollars, and the costs of the prosecution.

MARTIN, J. The defendant is appellant from a judgment on an indictment under the 18th section of the act of the 7th of June, 1806, (1 Moreau's Dig. 118,) which provides that, "no person occupying, or being owner of a plantation, shall be permitted to keep such* slaves on his plantation, without having a white, or free colored man as manager or overseer, under the penalty of fifty dollars for every month elapsed without complying with the provisions of this section."

We have not been favored with any of the grounds, upon which the hope of redress at our hands is entertained. We have not discovered any, except in the 21st section of the act, which declares that all the fines in the act "which have not been appropriated or the recovery of which has not been regulated, shall, if they do not exceed twenty-five dollars, be enforced, levied, and seized upon, by warrant of a justice of the peace of the county where the said offence shall have been committed, and provided the said fine exceeds the sum of twenty-five dollars, the said fine shall be recovered before a competent tribunal." The penalty prescribed by the 18th section is not appropriated or regulated by any other part of the act. We assume that the words *penalty* and *fines*, in these two sections are, used synonymously. It, therefore, follows, that the legislature has declared its intention that the recovery should not be had by a prosecution on an indictment, but by a suit or ordinary action before a competent tribunal. That is to say, before a Justice of the Peace, a Parish Court, or a District Court, which are respectively competent tribunals, according to the amount or number of the fines claimed; a prosecution by indictment

* *Id est*, any, the act providing for the punishment of offences committed by any slaves.

being clearly excluded, as there is but a single tribunal in the parish in which a grand jury is empanelled. The claim of the State ought, therefore, to have been enforced by a civil suit. As this court has jurisdiction of all civil suits, the officers of the State have no right, by instituting a civil suit in the form of an indictment, to deprive a citizen of the resort to this court, to which he would be entitled if the suit were brought in the mode prescribed by the act which denounces the fines.

The proceedings were clearly erroneous. It is, therefore, ordered that the judgment be annulled, reserving to the State her rights, according to the mode pointed out by law.

T. H. Lewis, District Attorney, for the State.

Linton, pro se.

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AMOS T. DWIGHT and others v. BENJAMIN F. LINTON.

An accommodation endorser, must be viewed in the light of a surety, and as such is entitled to discuss the property of his principal.

Discussion, like other dilatory exceptions, must be pleaded *in limine litis*. It cannot be received after issue joined.

Where a commission to take testimony has been duly executed, and returned into court, either party may use the evidence taken under it; and this right is not waived, by omitting to cross-examine the witnesses.

Art. 2256 of the Civil Code, which provides, that parol evidence shall not be received against or beyond what is contained in written acts, is inapplicable to a case where the defendant offers witnesses to prove that the endorsement of a note was merely as security, and that it was to be paid out of collections to be made by him from claims due to the drawer. The evidence neither explains, nor contradicts the written instrument, but goes to establish a collateral fact or agreement in relation to it.

APPEAL from the District Court of St. Landry, *Boyce, J.* The plaintiffs sue as endorsees of a promissory note made by Andrus & Harman, payable to the order of the defendant, and by him endorsed to the plaintiffs. Petition filed 13th April, 1840. On the 3d of June following, the defendant answered, that the plaintiffs had large claims against the commercial firm of Andrus & Harman, for whom he was acting as attorney; that he endorsed the

note as such, having received no consideration therefor, and with the express understanding that the amount was to be paid from collections to be afterwards made by him out of debts due to the drawees; and that Andrus, one of the drawers, had since died, leaving both real and personal property in the parish, sufficient to satisfy the debt. He prayed for discussion of the property of the firm, and of the succession of the deceased partner; and propounded interrogatories to two of the plaintiffs, to establish the allegations in his answer. On the 28th November, 1840, the court ordered the interrogatories to be answered by the first day of the succeeding term. At the May term following, the defendant presented a list of property to be discussed, consisting of various notes and judgments belonging to the drawers, and including the property of the succession of Andrus, and moved the court to fix the amount necessary to carry on the discussion, which motion was overruled on the ground that he was not entitled to the benefit of discussion. The defendant excepted to this opinion; and in the course of the trial took two other bills of exception, noticed in the opinion of the court, *infra*. Two of the plaintiffs who were interrogated, answered, that the note was not given for any debt due to them by the defendant, but for a debt of Andrus & Harman; that it was taken by one George A. Trowbridge, who acted as their agent; that they knew nothing of the circumstances under which it was given, but from him; and that, from his statements, they are satisfied that there was no such understanding as to the mode of its payment as the defendant alleges. G. A. Trowbridge testified that he acted as agent for the plaintiffs; that the defendant endorsed the note to secure its payment, and that there was no condition attached to the endorsement; that the note was for a debt due by Andrus & Harman; and that he knows nothing of any such understanding, or agreement, as that alleged by the defendant. Judgment for the plaintiffs.

Martin, for the plaintiffs. An endorser cannot plead discussion. 2 Mart. 353. 11 Ib. 434. 1 Ib. N. S. 478. Civ. Code, 3014. Parol evidence is inadmissible as a substitute for a written instrument (3 Starkie, 998-9); or to contradict it (Ib. 1002, *note s*); or to show what was said at the time of its execution (1 Mart. N. S.

640. 2 Ib. 361. 3 Ib. 692. 3 Starkie, 1005); or to add to it (3 Ib. 1006-7-8); or to alter its legal effect. 3 Ib. 1008-9.

I. E. Morse, contra. The judge, *a quo*, erred, in rejecting testimony to show that the note was to be paid from collections to be made by the defendant; in refusing him the benefit of discussion; and in permitting the plaintiffs to read the evidence taken under a commission by defendant, they having refused to propound any cross interrogatories, and the defendant having declined to use it. The authorities from Starkie, cited by the counsel for the plaintiffs, apply to negotiable paper in the hands of third persons.

MORPHY, J. The defendant, endorser of a note drawn by Andrus & Harman, has appealed from a judgment decreeing him to pay its amount. He has called our attention to three bills of exception, taken during the progress of the trial.

I. The defendant moved the court to fix the amount, necessary to carry on the discussion of certain property he had pointed out as belonging to the drawers. This the judge refused to do, on the ground that he was not entitled to the benefit of discussion. The motion was in our opinion properly overruled, but not for the reason assigned by the judge. An accommodation endorser, such as the evidence shows the defendant to have been, must be viewed in the light of a surety, and, like other sureties, is probably entitled to discuss the property of his principal. The motion should have been overruled, because the plea of discussion came too late. The defendant offered it about one year after his answer had been filed. Like all other dilatory exceptions, it must be set up *in limine litis*, and cannot be received after issue joined. Code of Prac. arts. 332, 333. Civ. Code, art. 3015. 1 Pothier Oblig. p. 316, No. 411.

II. The judge properly overruled the defendant's objection to the plaintiffs offering in evidence testimony obtained under a commission taken out by him, on the ground that as they had declined to putting cross interrogatories, the testimony was his, and could be used only by himself. When a commission duly executed is returned into court, either party may use the testimony taken under it, and he does not lose this right by waiving that of cross-examining his adversary's witnesses.

III. The defendant offered two witnesses to prove that his en-

dorsement on the note sued on, was merely as security, and that the same was to be paid out of collections to be made by him of claims due to the drawers, Harman & Andrus, and particularly out of a note due by Redmond & Harper, for about \$1700, in his hands. The court refused to hear these witnesses, being of opinion that parol evidence could not be received to change, or modify a written contract. We think that the court erred. We have repeatedly held, that the article of our Code which provides that parol evidence shall not be received beyond, or against the contents of a written act, is inapplicable to a case of this kind. The evidence offered was neither to contradict nor explain a written instrument, but to prove a collateral fact or agreement in relation to it. 12 Mart. 402. 1 Ib. N. S. 90. 2 Ib. N. S. 122. 3 Ib. N. S. 268. But even had these witnesses been heard, and had they testified to the agreement relied on by the defendant, their testimony would have been outweighed by that adduced against him. Their evidence might have destroyed the proof resulting from the answers of the plaintiffs to interrogatories propounded to them by the defendant, in which they denied the existence of any such agreement; but there would still remain the testimony of George A. Trowbridge, one of the defendant's own witnesses, who was the person who received the note for the plaintiffs, and who positively denies that any condition was attached to the endorsement, which was given as an ordinary accommodation endorsement.

Judgment affirmed.

WILLIAM MOORE v. JOHN RUTHERFORD.

Action, by the transferee of instalments due for the price of land. Defendant pleaded a deficiency in quantity, claimed a diminution of the price, and prayed that his vendors might be made parties, and condemned to refund a portion of the amount already paid. Judgment for the plaintiff, and appeal by defendant, the plaintiff alone being cited. *Held*, that the vendors stood towards the defendant in the capacity of plaintiffs, and should have been made appellees; and that the appeal must be dismissed for want of proper parties.

APPEAL from the District Court of La Fayette, *King, J.*

Action by the plaintiff, as transferee of certain instalments due for the price of "one hundred and six *arpens* of prairie land, and twenty *arpens* in the *commune* of prairie Sorrel, besides the wood-land belonging to said land in the concession of prairie Sorrel, with the buildings and improvements thereon," &c.

Voorhies, for the plaintiff.

Crow and Porter, contra.

SIMON, J. Plaintiff sues to recover the balance due on the price of a tract of land, sold to the defendant by one Eloy Landry and his wife, in virtue of a transfer or assignment of the debt, made to him by the vendors.

The defendant first pleads the general issue, and alleges that he purchased the land, for the price of which the present suit is brought, from Eloy Landry and his wife, as containing one hundred and six *arpens* of prairie land, and twenty superficial *arpens* of wood-land; that previous to the sale, his vendors had applied by petition to the court to grant an order of sale for a part of said land, and that after said sale, the vendors prosecuted their petition to a final judgment, and sold at public auction all the wood-land already conveyed to the defendant. He further avers that there is a deficiency in the number of *arpens* of prairie land, of about forty-five superficial *arpens*. He avers that he is entitled to a diminution of the price, to the amount of \$2000; that, therefore, he is not indebted to the plaintiff in any sum, and that his vendors are on the contrary indebted to him, in the sum of \$1200, out of the amount they had received previous to the transfer. He prays that Eloy Landry and wife be made parties to the suit; and that they be ordered and condemned to deliver to him the quantity of land by them sold, or, in default thereof, to pay him the sum of \$1200.

Landry and wife appeared and filed an answer, in which they state that they adopt as their own all the plaintiff's allegations; that they are true and correct; and that said plaintiff is entitled to recover of the defendant the amount by him claimed. They further aver that the tract of wood-land was sold by licitation among the co-proprietors, in consequence of a suit which had been instituted for that purpose; that the defendant was made a party to

said suit, and acquiesced in the judgment therein rendered ; that the proceeds of the sale were divided among the owners ; and that the defendant was classed as one of them on the tableau made by order of the court.

On these pleadings, the parties went to trial, and judgment having been rendered in favor of the plaintiff, the defendant has appealed.

Although, from the disposition we have concluded to make of this case, it is not our intention to express any opinion on its merits, we cannot forbear remarking that the record shows flagrant inconsistency between the allegations of the defendant, and his own acts after the institution of this suit. His answer was filed on the 9th of November, 1841, and on the 13th of the same month he paid to the plaintiff a sum of \$248, *on account of the amount due him* in the suit, without any reservation. After having thus acknowledged the legitimacy of the plaintiff's claim ; after having done an act which shows that the defence set up against his adversary's demand, was at least partly, if not totally unfounded ; how can he seriously pretend before us, as alleged in his answer, that the plaintiff is not entitled to recover any part of his demand, and that Landry and wife were bound to reimburse him a part of the price by them received ?

However this may be, we have come to the conclusion that this appeal cannot be maintained. Landry and wife having been made parties to this suit by the defendant, they joined the plaintiff, to sustain the demand set up by him in virtue of their transfer, and answered to the averments contained in the defendant's answer as against themselves. For aught we know, they were represented by counsel, on the trial before the District Court, and this we ought to presume, as there is nothing in the record going to show that they were dismissed from the suit, or that the defendant ever abandoned the claim set up by him against them. It is true that the judgment appealed from does not make any mention of the defendant's warrantors ; but this was unnecessary, since the plaintiff had succeeded. Landry and wife having joined the plaintiff to sustain his demand, and give effect to their transfer, stood towards the defendant in the capacity of plaintiffs ; and it was his duty to have made them appellees, and to have had them regularly cited

Tipton, Agent, v. Crow.

to appear before this court and answer to his appeal. 12 La. 271. Not having done so, we think this case cannot be proceeded upon before us in the absence of two of the parties ; and that the appeal should be dismissed.

Appeal dismissed.

EDMUND W. TIPTON, Agent, v. BASIL C. CROW.

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Where the amount fixed by the judge for the appeal bond, is less than that required by law to render the appeal suspensive, it will be good as a devolutive one ; the bond, in the latter case, being only to secure the payment of the costs.

APPEAL from the District Court of La Fayette, *King, J. Voorhies*, for the appellant.

Crow, propria persona, and *Porter*, contra.

SIMON, J. The plaintiff's claim is founded on an appeal bond, subscribed by the defendant as security, for the sum of \$300, and given in a suit in which, judgment having been rendered in favor of the plaintiff against one J. B. Mudd, curator of the estate of E. B. Mayfield, the latter took an appeal which was brought up before this court. 10 La. 189. The judgment appealed from, and affirmed by this court, was for the sum of \$1278 56, with interest. Plaintiff's claim is also founded upon the alleged fact that a blank sheet of paper signed by said J. B. Mudd, one P. M. Wilkins, and the defendant, was found among the papers of the estate of Mayfield, deposited in the office of the parish judge of the parish of La Fayette, which was intended to be filled up with a bond to be given by the said curator, for the surety of his administration as such. It is alleged that the defendant signed it as the security of J. B. Mudd, and that the said blank sheet of paper, so signed, ought to have the effect of a regular curator's bond, and that it is as binding upon the securities as though the same had been written out in full. Plaintiff prays that the defendant may be condemned to pay him the amount of the judgment affirmed by this court, after deducting the credits to which the defendant may be entitled, for payments made since the judgment.

Issue having been joined by the defendant, who avers in his answer that he never became security for Mudd as curator of the estate of Mayfield, and that he is not bound or liable to the plaintiff as by him alleged in his petition, the latter thought proper to probe the defendant's conscience, and to propound to him interrogatories in order to ascertain the circumstances under which the blank sheet of paper was signed. The purport of the defendant's answers to the interrogatories is, in substance, that, the sheet of paper in question bears his signature, but that he cannot say for what purpose it was so signed, and that he never considered himself security of Mudd as curator of Mayfield's estate.

There was judgment below in favor of the plaintiff for sixty dollars, from which he has appealed.

First. The order of appeal granted in the suit in which the appeal bond sued on was given, requires the appellant to give security in the sum of three hundred dollars, although the judgment appealed from was for a much larger sum; and this court has often decided, that where the judge directs an amount for the bond less than that required by law for a suspensive appeal, it will be good as a devolutive one. 5 La. 129. The appeal was, therefore, merely devolutive, and in such case, the object of the bond is to secure the payment of the costs only. Code of Pract. art. 578. The defendant in this suit cannot, consequently, be bound for more than the costs, which have been shown to amount to sixty dollars only.

Second. Nothing in the record shows that the blank sheet of paper sued on as signed by the defendant, was signed in order that a curator's bond might be written over the signatures. No order of the Court of Probates accepting the curator's securities, or fixing the amount of the bond, or even requiring a bond to be furnished, has been produced; and it is impossible to say what may have been the object of those who signed the paper. Nay, the idea of its being for the purpose of being made a curator's bond, is negatived and removed by the answers of the defendant to the interrogatories, in which he says that he never considered himself security of Mudd as curator of Mayfield's estate. This shows that when he signed the paper, he did not *then* consider himself as contracting the obligation for which he is now sued. The answers of the defendant to the plaintiff's interrogatories stand uncontra-

Cox v. Brashear.

dicted, and it would require very strong proof to destroy their effect. The facts that the defendant acted, on many occasions, as the counsel of the curator ; that the blank paper was found among the papers of Mayfield's succession in the parish judge's office ; and that the defendant was appointed and also acted as the counsel representing the absent heirs of the deceased, might perhaps raise a presumption that he was not ignorant that his client had furnished no bond ; but such circumstances are very far from being sufficient to make us presume that the paper in question was signed by him as the curator's security, and cannot in any way counterbalance or affect the faith and credit which we feel disposed to put in the statement under oath of a member of the bar, whose veracity we have never had any occasion to suspect.

Judgment affirmed.

NATHANIEL COX v. WALTER BRASHEAR.

APPEAL from the District Court of St. Mary, *King, J.* The plaintiff claimed \$4013 64, with interest at five per cent from the 10th August, 1832. There was a judgment in his favor for the amount, with interest from the 21st of June, 1833, from which the defendant has appealed.

GARLAND, J. This suit is brought on two bonds, which the defendant signed as the surety of Robert Brashear, curator of the vacant estate of William S. Barr, deceased. The plaintiff alleges that the curator has not administered the estate according to law ; that he has squandered the funds ; that he has not paid the debts ; that he is insolvent ; and has rendered no account. Barr died about the month of February or March, 1832. The curator was appointed soon after. On the 24th of May, 1833, he presented to the Probate Judge, a list of debts due by the succession, with the amount of funds on hand to be distributed among the creditors at that time ; and also his account. At the head of the list of creditors, Nathaniel Cox is placed for the sum of \$4519 72. The curator prayed that the list or statement of debts, and his *pro rata* dis-

tribution and account might be homologated, and that he might be continued in office another year, as the estate was not yet settled. A judgment of homologation was rendered after the proper notices, and an opposition made by one of the creditors; the *pro rata* share of Cox was fixed, and nearly the whole amount of it paid to him. The curator was continued in office for another year, but the defendant was not his surety on the bond given for the second year. On the 22d May, 1834, the curator presented to the Probate Court a second list of creditors, including all on the previous list who had not been paid, except Cox, with one or two new creditors. He also presented a *pro rata* distribution of the funds then on hand, and asked again to be continued in his curatorship. At the foot of the list of creditors, the curator adds: "Cox' claim is left out of this tableau, it being intended to dispute it, a sufficient fund being retained to pay him in the same proportion as the other creditors, if his claim be finally allowed." He also states that the estate was solvent. He prayed that he might be permitted to pay the creditors *pro rata* as stated, and that he might be continued another year in the administration. On the 16th of June, 1834, this account was homologated, and the curator continued in his functions for another year. He gave a new bond, shortly after this re-appointment, with the defendant as surety, since which time he has rendered no account of his administration, and is proved to have become insolvent. It is not shown that Cox had any notice of the filing of this second tableau or list of debts, further than the statement in the judgment that the usual publication had been made.

The inventory and sales show, that Barr's estate was represented to be worth upwards of \$22,000. The debts are shown to have been about \$15,000, including Cox'. At the time of filing the second tableau or list, the curator represents the whole amount of debts, exclusive of that in controversy, as \$7288 36, and states that he has on hand applicable to the payment of them \$4092 75, after retaining a sufficient amount to pay Cox his *pro rata* dividend, if entitled to it. It appears by an inventory that \$6490 64 of accounts, notes, &c. have been delivered to a subsequent curator.

This suit is brought on the first and third bonds given by the

curator, and the plaintiff alleges that he is entitled to recover, as his claim has been liquidated by the curator, placed on the list of debtors, and regularly recognized and approved by the Court of Probates in a legal manner, which judgment has been in part executed by the party, and has now the effect of *res judicata*. He avers that the curator had no right to annul the approval and recognition of his debt by the Court of Probates without notice, and a regular action to set aside what had been done by it; and further alleges that the defendant is bound by the judgment, and cannot contest its validity or amount.

The defendant contends, that he is not bound by the judgment or order of the Court of Probates; that he was neither party nor privy to the proceedings. He further says that the judgment was obtained through error or fraud, and is, or ought to be as to him, a nullity.

The case has been argued upon all these points, and many authorities have been cited to sustain these positions, and others settled in the case of *Parmelee and Baker v. Brashear*, 16 La. 72.

A careful examination of the facts, relieves us from the necessity of examining these questions. For if we allow the defendant the benefit of all his positions, the plaintiff would still be entitled to recover. The number of accounts in the record, and the mingling, in some instances, of the individual affairs of the defendant, with those of the succession of Barr, have produced some confusion. It appears that, in August, 1831, Barr wanted to raise some money; and that the defendant made a note payable to Cox, and lent it to Barr, which note fell due in April, 1832. This note Cox held at the time of Barr's death in March, 1832. Barr and Cox were engaged in business together, the latter being a factor in New Orleans, and the former a merchant in the country. On the 31st of August, 1831, an account current was stated, in which the note is not included, showing a balance of \$12,590 01 in favor of Cox. Various transactions took place between the parties between that time and Barr's death, which changed the state of the accounts; and at that period Cox had in his hands \$1901 57; but the note of \$2500 was to be paid; and at the same time there were various acceptances of Cox for Barr outstanding, amounting to about \$2400, drawn previous to Barr's death, which fell due

about six months after, which Cox had not then paid. This accounts for the expression in his letter to Birdsall, written soon after Barr's death, that he was then in debt to Barr, if the note of \$2500 were provided for. The note of \$2500 was not paid by the defendant at maturity, but renewed at four months; and when the new note fell due, it was renewed on the 17th of December, 1832, at four months. It does not appear that this note was ever paid by the defendant; and we find a receipt in the record, in which the curator acknowledges that he has received that note, and another of the same person for \$1700, dated December 20, 1832, for which he is to account as curator. These two notes are represented in all the accounts as the debts of Barr. He is charged with them when given, and when they fall due and are renewed is credited with the amount of the old note. There is no evidence that the notes mentioned in the receipt have been paid. Their being in the possession of the curator is accounted for by his receipt.

The account rendered on the 10th of May, 1832, shows in what way the sum then claimed was due. It was accepted and approved, and the evidence shows that the amount was due. It is too late now to dispute the charges of interest. The accounts in the record show that there have been various transactions since the death of Barr; and we find in the record an account rendered by the executor of Cox, in which it appears that the balance due on the 21st of March, 1837, was \$2279 97, for which sum the defendant is responsible, with five per cent interest from that date.

The judgment of the District Court is, therefore, annulled; and this court, proceeding to give such judgment as in its opinion ought to have been given in the court below, orders that the plaintiff recover against the defendant, the sum of two thousand two hundred and seventy-nine dollars and ninety-seven cents, with interest thereon, at the rate of five per centum per annum, from the 21st day of March, 1837, until paid, with the costs in the District Court; those of the appeal to be paid by the plaintiff.

Plaisted, for the plaintiff.

Dwight, for the appellant.

JOHN T. TOWLES v. ANN A. CONRAD, Administratrix.

The fact that a party was a minor at the time that a judgment was rendered against him, and that his tutor did not attend to, or understand his rights, or take the necessary pains to procure the testimony to establish them, will not entitle him to relief, though it be proved that a different judgment must have been rendered had the proper testimony been produced in the first instance. The first judgment is *res judicata*.

APPEAL from the Probate Court of St. Mary, *Dumartrait*, J.
Maskell and *Lewis*, for the appellant.

C. M. Conrad and *Voorhies*, for the defendant.

GARLAND, J. The petitioner states that, after the death of his mother, his father, being his natural tutor, gave a receipt on the 8th of June, 1818, wherein he acknowledged to have received from the succession of the petitioner's grandfather, in a tract of land in the State of Mississippi, the sum of \$4,000. He further alleges, that some years ago, his tutor, appointed after the death of his father, instituted a suit against the present defendant, to ascertain the amount due to him as the heir of Susan Turnbull, his mother; that in that suit, the tutor specially stated, that not having a personal knowledge of the petitioner's rights, he may have omitted to set forth some of the claims to which he was legally entitled, in which event, it was prayed that he might not be injured by such omission. He says that, at the time of instituting and trying said suit, it was not known to his tutor, nor to the persons by whom his rights were prosecuted, that his father had not received the land in kind, but that the price only had been received. He now alleges, that the estate of Turnbull, his grandfather, was indebted to his mother for a balance on her portion; that Robert Semple, the husband of Isabella Turnbull, a maternal aunt of the petitioner, was indebted to the succession of the common ancestor in about the same sum, as an excess over his wife's portion; and that Semple agreed to give a tract of land belonging to him, near Pinckneyville, in Mississippi, to the executrix in payment, which tract of land Towles, the father, agreed to take from the executrix of Turnbull's estate in payment of what was

owing to his wife, the mother of the petitioner. That Semple did not, at the time of this transaction, which was in the spring of the year 1812, make any deed of the land to the executrix, nor did she make any deed to Towles; but that the latter, in a short time, sold the land to one Yerby, who gave his notes to Towles for \$4,500, payable in one and two years, and that to save the necessity of making several deeds, Semple conveyed the land directly to Yerby, stating the consideration to be \$3,500 in cash; that on the next day, Yerby mortgaged the land to Towles, to secure the payment of the notes; and that they were afterwards discharged in full, with interest according to the laws of Mississippi. That a receipt was, on the 8th of June, 1818, long after the transaction, given by Towles, the father, to the executrix, in which it was erroneously stated that the sum of \$4,000 was received in a tract of land, when it was in fact received in money, and that \$4,500, with interest, was the true amount received. All these facts and circumstances, it is stated, were unknown to the late tutor of the petitioner, or to himself and his counsel, when the former suit was tried, in consequence of which the demand in that suit was disallowed; but that the Supreme Court, in revising the judgment, "reserved to him any right he might have to the tract of land in Mississippi." He avers that this reservation transferred the rights he was supposed to have on the land in case it remained in kind, to the proceeds, which passed into the hands of his father and natural tutor. That any other interpretation of the reservation would deprive him of his rights and property, and enrich the succession administered by the defendant at his expense. That there would be lesion in the judgment, at the time he was a minor, without his fault or the fault of those who represented him in the first suit. That his claim was excluded by an error of fact on the part of the court, in supposing that the land had not been sold, and that it could be recovered in kind.

He, therefore, prays for \$4,500, with interest and a legal mortgage, and for a correction of the error into which the court had fallen as respects this claim.

The defendant denies all the allegations, and further avers, that all these matters, so far as the estate she represents is concerned,

have been inquired into and decided, in the suit mentioned in the petition, which is reported in 10 La. 259 ; and she, therefore, pleads *res judicata* against the demand.

There was a judgment in the inferior court in favor of the defendant, and the plaintiff has appealed.

We have examined this case with the most earnest desire to extend relief to the plaintiff, but are obliged to decree that the plea of *res judicata* must prevail. The demand is essentially between the same parties. Turnbull, the tutor of the plaintiff, claimed all that was owing to him as the heir of his deceased mother ; the defendant is the same, and still acts in the same quality of administratrix. It only remains to inquire whether the thing demanded be the same, to bring the case within art. 2265 of the Code, and the case of *Plicque et al. v. Perret*, 19 La. 318. By reference to the petition filed in the suit decided, we find Daniel Turnbull, the tutor of the plaintiff, suing the defendant for various pieces of property which belonged to the present plaintiff's mother ; also for a settlement of the community that existed between his father and mother, for the hire of slaves, and for a large amount in money. Among other allegations in the petition is one, that John Towles, the father of the plaintiff, on the 8th of June, 1818, signed a receipt acknowledging that he had, at different times, received on account of his first wife, the plaintiff's mother, the sum of \$11,375. To make up this sum the \$4,000 were included. The plaintiff chose to assume that Towles (the father) had sold the land, which the receipt stated he had received, and he claimed the proceeds of the sale. This court, in its opinion, says : " it does not appear that the land was conveyed to Towles for that price, or that he had disposed of it. The title to the land and the slaves specified in the receipt, rests on the same ground ; and the slaves have been received by the plaintiff under it." The plaintiff wished the court to presume that Towles, the father, had sold the land ; but it declined to do so, and decided that the plaintiff could not make his estate liable for that which might yet exist in kind, and which was presumed to so exist, as there was no intimation of a sale, nor attempt to prove it. 10 La. 261.

There cannot be a doubt that, if the plaintiff had offered the same evidence in the first suit as in this, he would have recovered ; and the question is simply this, whether, if a party does not understand his own case, or will not take the necessary pains to obtain testimony, he can afterwards have relief, on an allegation that he was a minor, and that his representative did not attend to, or understand his true rights. We think he cannot. The receipt which was then relied on, is again offered in evidence, and relied on with accompanying explanations. The information now given, was then in the possession of the plaintiff's near relatives and neighbors ; his tutor knew, that a sale could not be proved by parol evidence unless under special circumstances, much less be presumed by a court of justice. This tribunal did not, therefore, fall into an error of fact in their former judgment, but decided upon the plaintiff's case, as his legal representatives presented it. What was demanded in the first suit ? The proceeds of the land unquestionably. What does the plaintiff now demand ? The proceeds of the same land, beyond all doubt ; for his own evidence shows that his father never received the amount claimed, in money, from the executrix of Turnbull's estate. The sum owing by that estate did not amount, according to Sterling's testimony, to the amount claimed, which shows that Towles, the father, had sold the land at a profit.

The plaintiff insists that the reservation made by the court in its judgment, protects him, and will enable him to avoid the plea of *res judicata*. We do not think so. Any *right* he had to the land itself is reserved, but it is absurd to suppose that the court intended to reserve a right to that which had been rejected absolutely, unless it were expressly so stated.

Judgment affirmed.

BAPTISTE COMEAU v. JEAN MELANÇON.

APPEAL from the District Court of La Fayette, *King, J.*
Voorhies, for the appellant.

Lewis, for the defendant.

MORPHY, J. The petitioner alleges that he is the owner of a tract of land in Côte Gelée prairie, in the parish of La Fayette, containing 485 acres and $\frac{1}{2}$, which he acquired in virtue of his settlement and cultivation prior to the year 1803, and of a confirmation of his claim by an act of Congress in 1816; that his claim has been regularly surveyed and located, under the authority of the United States; that he has, for more than thirty years, been in the quiet, peaceable, and uninterrupted possession of the land, and had every reason to believe that he had an indisputable title to the same, when the defendant, without any right whatsoever, entered upon his premises, and erected on a portion thereof fences, houses, &c., with a view to use and cultivate the same as his own, thereby trespassing upon his (the petitioner's) land, and causing him damages to the amount of \$500. He prays to be declared the legal owner of the land, and to be quieted in the possession and ownership thereof, and for damages. The answer avers that the defendant never enclosed or cultivated any land belonging to the petitioner; that all the land which he possesses and cultivates, belongs to a tract which he owns in the parish of La Fayette, at the place called Côte Gelée, containing three and two-thirds *arpens* in front, by a depth of forty *arpens*; that his (defendant's) title is derived from a Spanish grant to one Dauterive of one league and a half in front, which was afterwards sold in small portions to different individuals, and among others, to Simon Broussard, who purchased a piece of twenty-three *arpens*, which has since been regularly confirmed to him by the government of the United States, and that he (defendant) holds his tract from the said Simon Broussard through sundry mesne conveyances; that each of the portions sold by Simon Broussard was regularly located under the Spanish government by François Gousolin, a duly authorized Spanish surveyor, in such manner as to fix the front of the several tracts at a certain distance from the bayou Tortue, so as to give to the owners

about an equal portion of wood and prairie land ; that he (defendant) and those under whom he holds have been in the peaceable and uninterrupted possession of this land, according to the limits and boundaries fixed by the Spanish surveyor, for more than thirty years under just and sufficient titles, and that he has acquired the prescriptions of ten, twenty, and thirty years which he sets up against plaintiff's action. The judgment of the inferior court having been in favor of the defendant, the plaintiff has appealed.

From the plat of survey executed under an order of the District Court, it appears that the conflict which gives rise to the present controversy, results from the circumstance that the forty *arpens* with a front of three *arpens* and two-thirds on the bayou Tortue, to which the defendant asserts title, are claimed and have been measured from a line fourteen *arpens* and ten links distant from the bayou Tortue, instead of being measured off from the bayou itself, as the plaintiff contends they should be. The forty *arpens* of the defendant, when measured from the line he claims, reach a road in the prairie which separates his field from the house occupied by the plaintiff. The surveyor's *procès-verbal* mentions a post in the prairie close to the edge of the woods, which was represented to him by the defendant as the centre of his forty *arpens*, and as having been planted by Gousolin ; the twenty *arpens* on the north side of this post being woods, and the twenty *arpens* on the south side being prairie. The words " front to the bayou Tortue " in the defendant's certificate of confirmation, do not necessarily imply that his tract was to be measured from the margin of the bayou. But be this as it may, the defendant has entirely rested his case on his plea of prescription ; all the titles under which he holds and which go back as far as August, 1813, call for twenty *arpens* of wood land, and twenty *arpens* of prairie land ; and the testimony establishes that the defendant, and those under whom he holds, have cultivated the tract he claims to within one *arpent* and a half of the house of Comeau for the last twenty years, and that the defendant and the adjoining proprietors, holding under the same grant as himself, have always possessed twenty *arpens* in the woods, and have cultivated the land in the prairie to the end of the remaining twenty *arpens*, making the forty *arpens* called for by their titles, although they occasionally changed their fields ; that Morvan, a

Richard, Administrator, v. Parrott and Wife.

former proprietor of the tract now owned by the defendant, and who possessed it about thirty years ago, extended his fences to within three *arpens* of the place where Comeau's house now stands, and cultivated the land up to that point. The plaintiff seems to have been himself perfectly aware of the location and extent of his neighbor's tract, for Joseph Bernard, one of the witnesses, informs us, that when he built the plaintiff's house, about twenty-three or twenty-four years ago, he advised him to place it about one *arpen* nearer the bayou Tortue, the position appearing to him more eligible, but that the plaintiff answered that he could not, as the lines of the adjacent proprietors were very near, and he was afraid of finding himself upon the lands of those who fronted on the woods. The testimony moreover establishes, that the space between the line claimed by the plaintiff, and the bayou Tortue, which is very low ground, has always been considered as public domain, and so treated, by every one. With such evidence before him, it appears to us that the inferior judge did not err in sustaining the defendant's plea of prescription. Civ. Code, art. 3464.

Judgment affirmed.

FRANÇOIS RICHARD, Administrator, v. WILLIAM H. PARROTT and Wife.

A *brand* or herd of *running* cattle, advertised and sold as consisting of a certain number, amounted, in fact, to not more than a third. In an action for the price, defendants, having sold a part of the cattle, prayed for a rescission of the sale, or diminution of the price. *Held*, that as defendants could not return all the cattle they had received, the sale could not be rescinded, and that a diminution of the price was properly allowed.

APPEAL from the District Court of St. Landry, *Boyce, J.*
Linton, for the appellant.

T. H. Lewis and *W. B. Lewis*, for the defendant.

MARTIN, J. The plaintiff claims from the defendants the price at which the *brand* or running cattle of a succession, administered by the former, was sold. In the answer, the defendants claim the rescission of the sale, or a diminution of the price. One of

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the heirs of the succession illegally drove away a few of the cattle to a distant parish; and, moreover, the defendants could only find about one-third of the number which had been announced, in the advertisement of the sale, as bearing the brand.

The facts were proven, and the District Court granted a reduction of the price, and gave judgment accordingly. The plaintiff appealed. His counsel has contended: *First*, That the defendants have no right to complain, if they were mistaken in the number of the cattle. *Second*, That if any of the heirs, or other person, drove away part of the cattle, the defendants have their action against such person. *Third*, That if any misrepresentation was made, they may claim a rescission of the sale, but cannot claim a reduction of the price. The appellee has prayed an amendment of the judgment, and that the rescission of the sale may be decreed.

The defendants cannot be relieved in this action, against the act of the heir who drove away a part of the cattle; but they show that the brand was advertised as composed of about five hundred head, and that about one-third only of that number was obtained.

The defendants have sold a part of the cattle which they obtained; so they are not in a situation to demand the rescission of the sale, as they are unable to return all the animals they received. They were, therefore, properly relieved by a reduction of the price.

Judgment affirmed.

CASES
ARGUED AND DETERMINED.
IN THE
SUPREME COURT OF LOUISIANA,
IN THE
WESTERN DISTRICT, AT ALEXANDRIA,
COMMENCING, OCTOBER, 1842.

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**PRESENT :**

**HON. FRANÇOIS XAVIER MARTIN.**  
**HON. HENRY A. BULLARD.**  
**HON. ALONZO MORPHY.**  
**HON. EDWARD SIMON.**  
**HON. RICE GARLAND.**

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JOHN SIBLEY v. THE ROMAN CATHOLIC CONGREGATION OF NATCHITOCHEs.

Where, after obtaining an order allowing him an appeal, plaintiff does not appear to have attempted to avail himself of it by giving bond and security, nor to have taken any steps, until after the expiration of a year from the date of the judgment, to procure a transcript of the record, nor to have made any application to the judge *a quo* for a new appeal, the right of appeal will be lost.

MARTIN, J. On the affidavit of the plaintiff that an appeal had been granted to him in due time, from a judgment against him in the present case, returnable on the first Monday of October, 1831, but that the order of the judge, and the petition on which it was made, have, without any fault of his, been lost, and that the clerk's office has been in vain searched for them, a rule was obtained on

 Brittain v. Richardson, Curator.

the defendants to show cause why the appeal should not be brought up, returnable on the first Monday of October, 1834. The defendants showed cause. They aver that they are ignorant whether any appeal was ever granted as stated by the plaintiff; that if any such appeal was granted, the record ought to have been brought up on the return day, to wit, the first of October, 1831; that it does not appear whether the plaintiff ever complied with the conditions of the order by giving bond and security, or ever applied to the judge who granted the order for a new one. After obtaining the order for the appeal, the plaintiff does not appear to have attempted to avail himself of it, by giving the bond and security required by law; nor to have taken any step to have the transcript prepared and filed in this court on the return day, until after the expiration of one year from the rendition of the judgment appealed from; nor to have made any application to the District Judge for a new appeal. The rule must, therefore, be discharged.

The rule was submitted, without argument.

CHARLOTTE BRITTAİN V. ROBERT W. RICHARDSON, Curator.

An instrument, the real object of which was a disposition *mortis causa*, if executed without the formalities required by law to give it validity as such, can have no effect. All donations *inter vivos* must be passed before a notary and two witnesses.

Where donations *mortis causa* or *inter vivos*, are clothed with the formalities required by law to give them validity, the forced heirs alone can sue for their reduction, in case they exceed the disposable portion; but when void for the want of such formalities, the legitimate heirs or other representatives of the estate, as well as the forced heirs, may sue to annul them.

APPEAL from the Court of Probates of Ouachita, Lamy, J.

MORPHY, J. The plaintiff seeks to recover from the succession of Felix Matthes \$4000, the amount of a promissory note of the deceased, made to her order, bearing date the 1st of March last, and payable on the 1st of February next. The curator of the estate pleads the general issue, and avers that the note sued

3r	78
50	1036
8r	78
52	585

on, if ever executed by the deceased, is a feigned donation, made for the purpose of giving the plaintiff all the property of the deceased without any consideration whatsoever, and is therefore null and void. The attorney for the absent heirs intervened, and after setting up some matters of defence much to the same effect, propounded interrogatories to the plaintiff, inquiring into the consideration of the note sued on, and as to the means of which her late husband, William Brittain, died possessed. There was a judgment below rejecting the petitioner's claim, from which she has appealed.

The execution of the note is proved by a witness who drew it up and attested it, but it does not appear to us that the plaintiff has succeeded in showing that a valuable consideration was given for it. She says, in her answers to the interrogatories, that the note was given to her in consideration of the kind treatment which the deceased had received from herself and her late husband, and for money sent to him by the latter, in the State of Mississippi, some time in the year 1825; but that she does not know the amount lent, nor in what money it was given. She states that her husband died in the latter part of January, 1842, and did not leave more than about \$700.

Joseph Hedge, the subscribing witness to the note, testifies that when it was signed by Matthes, he was sick at the plaintiff's house, but in sound mind; that he said, that if he did not get relief, he would certainly die, and, as he signed the note, remarked that it would be nothing but plaintiff's just due; that about two months before that time Matthes declared, at his (witness') house, that some years ago his uncle Brittain gave him \$250, with a horse, saddle and bridle, to enable him to go to Red River or Texas, and get into some business that would be of advantage to him, and that his uncle had frequently assisted him, as he had always been a spendthrift and a good customer to coffee houses; that he knows of no other consideration received for the note than the \$250, and the horse, saddle and bridle, except that Brittain furnished Matthes with some provisions which he brought from New Orleans, and that the deceased lived at Brittain's house, where he boarded, although he had a separate place. The record

shows that the property left by the deceased amounted to \$1292 25, and that he had a sister married to one McAllister.

Copley, for the plaintiff. The evidence shows that there was a sufficient consideration for the note. The court must presume in this, as in all other contracts, that there was a sufficient consideration. He who alleges the contrary, must prove it. 8 Mart. 181. 8 Ib. N. S. 295. 4 La. 220. 5 Ib. 78. A donation under the form of an onerous contract is not void. 2 La. 215. The forced heirs, alone, can sue for the reduction of a donation exceeding the disposable portion, (Civ. Code, arts. 1491, 2418,) or to annul a disguised donation; and the *onus probandi* is on them. The record shows that Matthes had no forced heirs.

Richardson, pro se. The instrument is void, as a note, for want of consideration (Civ. Code, arts. 1887, 1888. 3 La. 435); or as a donation *inter vivos* or *mortis causa*, for want of the forms prescribed by law. Civ. Code, arts. 1523-5, 1563. All donations must be made by public act. Ib. art. 1623.

MORPHY, J. The testimony does not, in our opinion, show a valuable consideration in the legal sense of the term. It discloses rather the motives which led the deceased to execute, in favor of the plaintiff, this note, which was clearly intended to cover a donation to her. Admitting that the small sum, which was either lent or given in 1825 to the deceased, created such a natural or moral obligation as could form a sufficient consideration for a note of an amount about equal, it is obvious that the enormous overplus for which he bound his estate was a donation which he wished to make in her favor in consideration of the kind treatment and frequent assistance he had received from her husband, at whose house he was then sick, and impressed with the belief of his approaching dissolution. We are confirmed in this conviction, from the circumstance that on the trial below the plaintiff was ruled to produce, and did produce in court a paper purporting to be the last will of the deceased which she had in her possession, and in which she was appointed his universal legatee. Some time before the institution of the present action, this paper had been sent by the plaintiff to the executor of her deceased husband, and presented to the probate judge, but being found altogether

Puckett and Wife v. Clarke.

informal, it was not admitted to probate. Considering the instrument sued on as one having for its object a disposition *causa mortis*, and as having, as such, none of the forms prescribed by law, it can have, in our opinion, no legal effect or validity, and no recovery can be had on it. Civ. Code, arts. 1453, 1455, 1563. 17 La. 144. But it is said that a donation, under the form of an onerous contract, is not void, and the case of *Trahan v. McMannūs et al.*, reported in 2 La. 215, is relied on. Without inquiring how far the principle laid down in that decision can be supported under the provisions of the present Civil Code, which differ on this subject from those of the old Code, it is sufficient to say that the instrument sued on is under private signature, when our law requires that all donations *inter vivos* shall be passed before a notary and two witnesses. Civ. Code, arts. 1523, 1525. But we have already said that, under the evidence and circumstances of this case, we cannot view this note in any other light than as a donation *mortis causa*. When donations *mortis causa*, or *inter vivos*, are clothed with all the forms required by law to give them validity, none but forced heirs can sue for their reduction, if they exceed the disposable portion; but it is otherwise, when they are null and void for the want of such formalities; the legitimate heirs of the deceased or other representatives of the estate having, as well as the forced heirs, an action to have them annulled.

It is, therefore, ordered that the judgment of the Court of Probates be affirmed with costs; reserving, however, to the plaintiff any claims she may have against the estate of the late Felix Matthes.

WILLIAM H. PUCKETT and Wife v. ELIJAH L. CLARKE.

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Courts of justice will not lend their aid to either party, to enforce a contract entered into for purposes reprobated by law.

APPEAL from the District Court of Ouachita, *Boyce, J.*

Copley, for the appellants.

McGuire, for the defendant.

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BULLARD, J. The plaintiffs assert title to eight slaves, which they allege are in the possession of the defendant, and that he obtained them, together with two horses, illegally and fraudulently, and under false pretences and promises made to the plaintiffs to preserve them for their benefit, and to restore them when required. The defendant, in his answer, avers that he has a just title to the slaves, and that this action is brought in fraud to deprive him of his just rights. The case was submitted to a jury, whose verdict was for the defendant, and the plaintiffs have appealed.

It appears that the wife, one of the plaintiffs, inherited the slaves in the State of Mississippi, and that they became the property of the husband on their marriage, according to the laws of that State, and were afterwards sold under execution to satisfy a judgment against the husband, and bought in by the defendant, who left them in the hands of the plaintiffs until sometime afterwards, when they were delivered to the defendant, to prevent their being seized by other creditors of the husband. The sheriff's sale was probably not a real one, according to the evidence in the record, and no conveyance was made, but the slaves were left in the plaintiffs' possession. The defendant was, however, afterwards put in possession for purposes reprobated by law, that is to say, for the purpose of enabling him to set up his title under the first sheriff's sale, and thus hold himself out to the world as the owner, and defeat the pursuits of other creditors of the husband. The present action is brought, substantially, to obtain relief against that agreement, and to cause the defendant to restore the property since the danger has passed away. Under these circumstances, our first inquiry should be, whether the case be one in which a court of justice ought to interfere, or whether it be not of that class of cases in which the maxims, *ex turpi causa non oritur actio*, and *in pari delicto potior est conditio possidentis*, apply. In the case of *Gravier's Curator v. Carraby's Executor*, 17 La. 118, we stated explicitly the principles by which we consider ourselves bound to be governed in questions of this sort. It is not easy to distinguish the present case from that. In the case now before us, if the sheriff's sale was not a sham one, it vested the title in the defendant; and if it was, then there was collusion for the fraudulent purpose of covering the property, and the subse-

Copley v Harrison and Wife.

quent shifting of the same property back and forth, was in furtherance of the same design. Such contracts and transactions are illegal, and the parties will not be listened to when they invoke the aid of the court to enforce them against each other.

Judgment affirmed.

GEORGE W. COPLEY v. BENJAMIN HARRISON and Wife.

APPEAL from the District Court of Union, *Boyce, J.*

BULLARD, J. This is an action by an attorney at law, to recover his fee for professional services rendered to the defendants. There was a verdict and judgment for the defendants, and the plaintiff has appealed.

The case in which the plaintiff was employed was much litigated, was pending several years, and was twice before this court on appeal. The parties finally compromised, without consulting the plaintiff. In the account annexed to the petition the plaintiff charges \$650 for his fee, and gives credit for the net proceeds of a note of the defendants for \$150, discounted in bank, for which he received the sum of \$141 16. The jury appear to have thought, either that that sum was received as full compensation, or that it was as much as the plaintiff's services were worth. We cannot concur in this conclusion. There is no plea of payment, and the services we think were worth more. Considering the amount in dispute, and the protracted litigation attending the case, we think the plaintiff entitled to a fee of \$500. Deducting the amount already received, there will remain due \$358 84, for which he is entitled to a judgment.

The judgment is, therefore, reversed, and the verdict set aside; and proceeding to give such judgment as ought, in our opinion, to have been rendered below, it is adjudged and decreed that the plaintiff recover the sum of \$358 84, with costs in both courts, and interest at five per cent from judicial demand.

Copley, appellant, pro se.

McGuire, contra.

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RICHARD CHARLES DOWNES v. WILLIAM S. SCOTT.

The act of Congress of 29th May, 1830, granting pre-emption rights to settlers on the public lands, which provides, sect. 2, that "where two or more persons are settled on the same quarter section, it may be divided between the two first actual settlers, if, by a north and south, or east and west line, the settlement or improvement of each can be included in a half-quarter section, and that in such case the settlers shall each be entitled to a pre-emption of eighty acres elsewhere in said land district," is directory only. Its object is to give to each settler, *first*, the portion of land on which his improvements were made, and *secondly*, as nearly as possible, an equal quantity of land. Equality of value was not considered important. The direction of the line of division was of secondary consideration, and only intended to effect the principal object.

Where the United States have sold, and given a patent for a tract of land, the property is vested in the purchaser; and the laws of the State in which it is situated operate on it as on other property, except as to taxation, or other special exception; and in effecting a partition, such laws, and the contract of the parties, will, as in other cases, control.

In ordering a partition between settlers on the same quarter section, holding as tenants in common, by purchase from the United States under the pre-emption law of 29th of May, 1830, or between others holding under them, the provisions of that act will be considered as expressing the original intention of the parties as to the direction of the line of division, where the quarter section is a regular one; *aliter*, as to irregular or fractional surveys. Where lines drawn north and south, or east and west would not give to each an equal quantity of land, as well as his improvements, the line must be drawn in some other direction, or the land cannot be divided in kind.

The verdict of a jury must be always understood with reference to the pleadings, and as responsive to the issues made by them.

THE plaintiff is appellant from a judgment of the District Court of Madison, *Curry, J.*

GARLAND, J. The petitioner alleges that he is the legal owner and possessor of the undivided half of a tract of land, containing $133\frac{1}{8}$ acres, situated on both sides of Brushy bayou, being lots Nos. 1 and 3, of section No. 6, in township No. 16 north, range No. 13 east, which land was patented by the United States, as a pre-emption right, to Elijah Evans and Levi Blakey, as tenants in common, and not as joint tenants. He avers that, by the laws of the United States, it is required that lands so situated and purchased, shall be divided between the co-proprietors or tenants in common, by a north and south, or east and west line. He states this

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land must be divided by a north and south line, in order to give each party the improvements of his vendors, the original settlers ; and that he is the legal owner of the portion which includes the site of the original settlement of the patentee Elijah Evans, which is on the east half of said land. It is further represented that the defendant Scott is in possession of the west half, and of part of the east half of the said land ; that he has enclosed and is cultivating some of the land belonging to the petitioner (from ten to twelve acres), by doing which the petitioner has sustained damage to the amount of \$350. He alleges that he has frequently desired the defendant to divide the tract by a north and south line, which he refuses to do. The petition concludes with a prayer, that the land may be divided by a north and south line ; and that the complainant be decreed to be the legal owner and possessor of the east half ; and that Scott pay him \$350 as damages.

The defendant, in his answer, admits that the plaintiff is the owner of an undivided half of the land, which he says is in two distinct lots, as stated in the patent ; avers that he is, and always has been, willing, to divide the land by a north and south line, but that he objects to throwing the two lots together, and dividing them as a whole, by a continuous north and south, or east and west line. He alleges that he has frequently desired the plaintiff to divide each lot by a north and south line, but that the plaintiff refuses so to do. He joins in the prayer for a partition according to law ; prays for \$200 damages from the plaintiff for instituting a vexatious suit against him, and for costs.

The case was tried by a jury. It was shown by the public surveys, that, in consequence of a considerable stream running through the section, the north half was not, as in other sections, divided into two equal quarters, but into three lots of irregular shapes, and containing unequal quantities. Lots 1 and 3 adjoin each other, the former being a slip of upwards of a mile front on the north side of the bayou, with very little depth at one extremity, and less than a half a mile at the other. The superficial quantity, is $60\frac{3}{8}$ acres. Lot No. 3 is nearly triangular, lying on the south side of the bayou, and so far as it fronts thereon, is opposite to lot 1 ; and contains $72\frac{3}{8}$ acres. It is proved that, by dividing the land by a continuous north and south line through the

two lots, the plaintiff would have on the east side of the line nearly twice as much land as the defendant would have on the west, as well as much the largest portion of the cleared land ; and that his share would be more valuable than the other by \$300. It was also shown that lot No. 3 is subject to inundation, and that by dividing it as desired by the plaintiff, much the largest proportion of the overflowed land would fall to the defendant's share. It is proved that by dividing each lot equally by a north and south line, each party will have his houses in lot No 1 on the north side of the bayou, and have his portion of No. 3 opposite ; but that the fronts will not be exactly the same.

The jury found that the lots Nos. 1 and 3 should be divided separately in equal portions, by a line running north and south. After overruling a motion for a new trial, the court ordered the lots to be partitioned separately, by running a north and south line through each, so as to divide each lot into equal portions, and appointed a surveyor to run the division lines and return an account of his operations into court, on or before the first day of the succeeding term ; and ordered the plaintiff to pay the costs up to that time. From this judgment he has appealed.

The application for a new trial was based on the misdirections of the judge in his charge to the jury, on the verdict being contrary to the law and evidence, and, lastly, on the ground that it was void for uncertainty, as it does not definitely specify whether the plaintiff is to have the east or the west half of the land.

The judge charged the jury that the act of Congress, relating to pre-emption rights, passed on the 29th of May, 1830,* was not applicable to the case before them ; that it had no effect as to the partitioning of lands, sold to settlers on the same quarter section, or fractional quarter, after a patent had issued ; that such partition must be made in conformity to the laws of the State and

* This act provides : Sect. 2. That if two or more persons be settled upon the same quarter section, the same may be divided between the two first actual settlers, if, by a north and south or east and west line, the settlement or improvement of each can be included in a half-quarter section ; and in such case the said settlers shall each be entitled to a pre-emption of eighty acres of land elsewhere in said land district, so as not to interfere with other settlers having a right of preference.

the principles of equity and justice; and that the object of the act was to entitle two settlers on the same quarter section or fractional quarter, to the benefit of a *float*, or claim for eighty acres of land elsewhere. To this charge, the plaintiff excepted. We are of opinion that the judge did not essentially err. The language used by him does not exactly express our ideas, but the conclusion we have come to is the same. We are of opinion that, after the United States have sold, and given a patent for a tract of land, the property is vested in the citizen entitled to the patent, and that the State laws operate on it precisely as on all other property, except as to taxation or other special exception; and that for effecting a partition, the laws of the State and the contract of the parties, are, as in other cases, to control. The act of Congress under which Blakey and Evans purchased the land, formed the contract between them, as to the quantity which each was to have. The principal objects of that contract were, *first*, to give each party the portion of land on which his house and improvements were situated; *secondly*, to give, as nearly as possible, an equal quantity to each. The course of the lines is a secondary consideration, and intended only as a means of effecting the principal objects. An equality of value in the portions does not seem to have been considered as important, and is not included in the contract. Courts, in ordering a partition between two original pre-emptors, or those holding under them, will look to the act of Congress as containing, in relation to regular quarter sections, the primary intention of the parties, as to the direction of the lines; but in relation to a fractional, or as the Commissioner of the General Land Office calls it, an anomalous survey, the rule does not apply; and the judge was, therefore, correct, in directing the jury that the act of Congress was not to govern them absolutely. We can easily imagine two improvements to be so situated on a fraction of land, that neither a north and south, nor east and west line, would give each an equal quantity, and his improvements. In such a case, the line must take some other direction, or the land could never be divided in kind. An examination of the act of Congress will show, that there is nothing mandatory in it, even to its own officers. It is directory only in its operation on

the rights of individuals, and is not so unbending as to compel the perpetration of an act of gross injustice.

A perusal of the evidence satisfies us that the jury decided in conformity to it, and to the principles of law and justice.

The plaintiff complains that the verdict is indefinite and uncertain, as it does not state whether he is to have the east or west portion of the lots, when divided. The verdict and judgment might have been somewhat more definite in this respect; but when we look at the whole case, we think the parties will not probably lose any of their rights from the cause complained of. It has long been settled by this court, that the verdict of a jury must always be understood and construed with reference to the pleadings, and will always be considered as responding to the issues made by them. 5 Mart. 456. 3 La. 70. When we refer to the petition, we see that it is stated that the plaintiff is entitled to the eastern portion of the land. He states that his buildings and improvements are on it; and that the defendant's are on the western part, if the line be run north and south. The defendant claims in the same way, and says the same thing. It will be somewhat strange, if the parties misunderstand each other and their rights, when they agree in their statements as to the position of each. But should any mistake be likely to arise, we do not doubt that the District Judge will, when the *procès-verbal* of the surveyor shall be returned into court, state distinctly which portions of the lots of land the plaintiff is to have.

We are of opinion that a division of each lot of land into equal portions by a north and south line, is legal and just; and, therefore, affirm the judgment with costs.

D. Bradford, and *Copley*, for the appellant. No counsel appeared for the defendant.

JOSEPH D. LONG v. PETER F. KIMBALL.

APPEAL from the District Court of Natchitoches, *Campbell, J. Tuomey*, for the appellant.

P. A. Morse, contra.

MARTIN, J. The plaintiff is appellant from a judgment refusing him damages, for injury done to his flat-boat, loaded with lumber, by a steamboat belonging to the defendant, through the gross neglect of the master and those on board. His counsel has referred us to the case of *Saune v. Tourne, &c.*, (9 La. 425,) and to the same on a re-hearing, (Ib. 429,) in which we held that it was incumbent on the defendant to show that the steamboat made use of all proper precaution to avoid running upon the schooner, when the schooner was descending the river, and the steamboat ascending ; and he has contended that the present case, which is that of a flat-boat descending the river, is much stronger than that of a schooner, the latter being more manageable. The District Judge was of opinion that the injury to the flat-boat, was rather the result of accident than of neglect, or want of skill in the master of the steamboat or those on board. The flat-boat was concealed from those on board the steamer by a point of land which projected into the river, until it was too late for the latter to prevent the collision. As usual in cases of this character, there is a good deal of contradiction between the testimony of persons on the respective vessels ; but it does not appear to us that the District Court erred in the conclusion to which its examination of the evidence led.

Judgment affirmed.

DANIEL GALPIN v. GEORGE JESSUP.

The express exclusion, in the sale of a slave, of warranty, except as to title, is not, as a general rule, equivalent to a declaration of unsoundness, and will not relieve the vendor from the obligation of disclosing redhibitory vices or maladies, not apparent, which he knows to exist; and the concealment of such defects will be fraud within the meaning of art. 2526 of the Civ. Code. *Aliter*, where from the terms of the exclusion, the idea is conveyed that the slave was unsound; in such case, the exclusion will amount to a declaration of unsoundness.

APPEAL from the District Court of Ouachita, *Willson J.*

This was an action to rescind the sale of a slave, the plaintiff having given his note for the price. There was a judgment rescinding the sale, and ordering the note to be given up, or, in default thereof, security to be given to the plaintiff to protect him against any liability on the note.

McGuire, for the plaintiff.

Copley, for the appellant.

MORPHY, J. This is an action to rescind the sale, and to recover a note given for the price of a slave sold to petitioner by the defendant, on the ground that the negro was diseased, and of no value at the time of the sale; and that the seller knew it, but concealed the fact for the purpose of defrauding him. There was a verdict and judgment below in favor of the plaintiff; and the defendant has appealed.

The sale was made with an exclusion of warranty, in the following words: "The vendor does not guaranty said negro man against the vices prescribed by law, and the said purchaser hereby expressly purchases said slave accordingly, and exacts only guarantee of title to said slave from said vendor." From the words of this clause, the exclusion of warranty does not, perhaps, extend to redhibitory diseases, as it mentions only the vices provided against by law, unless it be inferred from the latter part, which restricts the warranty to title only; but, be this as it may, the sale seems to have been considered and treated, on all hands, as one without any warranty, except that relating to title. The charge given by the judge on the trial is complained of, because he declined to charge the jury that the refusal to warrant the slave was

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equivalent to a declaration of unsoundness of the negro, on the part of the seller. The judge properly declined so to instruct the jury. If an exclusion of warranty was to be always viewed as a declaration of unsoundness, no recovery could ever be had in such cases, as no fraud or concealment could ever be imputed to a vendor who should sell without any warranty. In the case of *Nelson v. Lillard*, 16 La. 340, to which the appellant's counsel has referred us, the warranty of being *sound in body* was specially excluded, in such terms as to convey the idea that the slave was unsound, and to indicate that he was sickly and subject to diseases then unknown. This, under the peculiar circumstances of the case, the court considered as a declaration of unsoundness; but we are by no means prepared to lay down, as a general rule, that an exclusion of warranty, stipulated by a vendor, must be considered as a declaration of unsoundness, and thus absolve him from all liability. Our Code expressly provides that, the renunciation of warranty made by the buyer is not obligatory, where there has been fraud on the part of the seller; and, in accordance with this provision, this court has repeatedly held, that the exclusion of warranty in a sale does not relieve the vendor from the obligation of disclosing the redhibitory vices or maladies, not apparent, which he knows to exist, and that the concealment of such defects is fraud within the meaning of article 2526 of the Civ. Code. 1 Mart. 140. 6 Ib. 699. 7 Ib. 33. 18 La. 38.

From the evidence, the disease of this slave does not seem to have been well understood or defined, by the several physicians who testified. It can be gathered, however, from their testimony, that it was a disorder of the *viscera*, creating a morbid appetite, and occasional swellings in the abdomen and stomach of the subject, and benumbing at times his physical and mental faculties. Most of the witnesses agree that the negro was entirely useless, and some declare that they would not have maintained him for his labor. It is said to have been proved, that, from the appearance of the boy, any attentive person might have discovered that something was the matter with him, and that therefore the plaintiff cannot complain. Some of the effects of the disease might, indeed, have been visible, but it does not follow that the purchaser knew the nature and extent of the disease, which could not have been un-

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known to the defendant, who had had the boy for some time in his possession, and had called in physicians to attend on him. He was bound to disclose it to the purchaser. There is some contradictory evidence in regard to the facts of the case, which cannot be said to be a strong one in favor of the plaintiff; but, upon the whole, it has appeared to us that the verdict is not so clearly erroneous as to make it our duty to disturb it.

Judgment affirmed.

SUCCESSION OF AUGUSTUS LUDEWIG—MARIE B. LUDEWIG,
Appellant.

Under art. 335 of the Code of Practice, the exception of *litispendencia*, must show the pendency of another suit, between the same parties, for the same object, and growing out of the same causes of action, before another court of concurrent jurisdiction. Courts of Probate have exclusive jurisdiction of claims for money against successions administered by curators, executors, &c.; and all suits for money, pending before the ordinary tribunals, against one who dies leaving a vacant succession, must be transferred to the Court of Probates of the place where his succession is opened.

APPEAL from the Court of Probates of Ouachita, *Lamy, J.*

McGuire, for the appellant.

Copley, contra.

MORPHY, J. Marie Barbe Ludewig, having sued her husband, Augustus Ludewig, in the District Court for a separation of property and for the restitution of her dotal and paraphernal effects, Bernard Hemken intervened in the suit for the preservation of his rights as a creditor of the husband, alleging fraud and collusion between the parties, and praying judgment for the amount of his debt. Augustus Ludewig died shortly after, and his wife was appointed curatrix to his vacant estate. Hemken presented his claim to her against the deceased, which she neglected or refused to acknowledge, and he has brought the present action to establish it as a just debt against the succession, and to cause it to be paid in due course of administration. Judgment having been rendered accordingly, the curatrix has appealed.

There is no dispute as to the appellee's claim, which is proved

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by notes and due bills, the execution of which was admitted on the trial below ; but it has been contended that, inasmuch as Hemken had commenced in the District Court a suit for the same debt which was yet pending, he could not maintain the present action. This position is altogether untenable. The plea of *litispendencia* must show the pendency of another suit between the same parties, for the same object, and growing out of the same cause of action, before another court of *concurrent jurisdiction*. Code of Prac. art. 335. It is clear that by the death of Augustus Ludewig the main object of the suit brought against him by his wife was accomplished, as it dissolved the community existing between them. If she is entitled to a liquidation of her claims against her husband, it is on a different ground than that relied on in her suit, which must necessarily abate, and, with it, the intervention of Hemken. The latter took the only course he could legally pursue, which was to present his claim to the legal representative of the estate, and upon her refusal to acknowledge it, to bring suit to have it admitted and ranked among the debts of the succession. Code of Prac. arts. 984, 985, 986. The Courts of Probate have exclusive jurisdiction to decide on claims for money against successions administered by curators, executors, &c., and all suits pending before the ordinary courts for sums of money against a person who dies leaving a vacant succession, must be transferred and prosecuted before the Probate Judge of the place where the succession is opened. Code of Prac. arts. 924, 983. Civ. Code, art. 1105. 11 La. p. 360.

Judgment affirmed.

JAMES MILLER v. STARKEY GASKINS.

The provisions of the Code of Practice, art. 746, *et seq*, authorizing summary process to enforce judgments rendered in other States or in foreign countries, instead of the ordinary action on the record, which was formerly the only mode of proceeding, must be strictly pursued; and the party resorting to it must show, that he comes clearly within the law, not in appearance only, but in reality.

Defendant having procured an order of seizure and sale, on a judgment rendered in another State against the plaintiff, a resident of Louisiana, under process of arrest, the latter enjoined the proceeding, alleging, though it appears from the record that an answer was put in for him by an attorney, that no one was authorized to appear for him, and that he never appeared or defended the action. On a motion to dissolve, on the ground that the facts alleged, though true, are insufficient to maintain the injunction: *Held*, that admitting the allegations of the petition to be true, the judgment can have no greater effect than one rendered, after personal services, but without appearance, on a judgment by default; and that the motion should have been overruled.

APPEAL by the plaintiff from a judgment of the District Court of Concordia, Curry, J.

Saunders, for the appellant.

F. H. Farrar, for the defendant.

BULLARD, J. Gaskins, having obtained a judgment in the State of Mississippi, against Miller, a resident of Louisiana, as endorser of a promissory note, on presenting an authenticated transcript of the record, procured from the judge of the ninth district, a summary execution, or order of seizure and sale, against the property of the defendant. Proceedings on this process were arrested by an injunction sued out by Miller, founded upon various allegations, which we shall presently set forth in substance. The injunction was afterwards dissolved, on the motion of the defendant, on the grounds: *first*, that the facts and allegations set forth in the petition, even if true, are insufficient in law to maintain the injunction; and *secondly*, that no sufficient affidavit was made.

The allegations set forth in the petition are, substantially: That, in February, 1839, Gaskins brought suit against Miller in Mississippi, upon a note endorsed by him and others, as accomodation endorsers for Bailly & Wade of that State and Smalley of Louisiana, the drawers thereof, and recovered judgment against him at the November term, 1840, in pursuance of which judgment ex-

Miller v. Gaskins.

ecutory process had been issued. That at the time of endorsing the note, and of the institution of the suit and the recovery of the judgment, Miller was, and that he is yet, a resident of the parish of Concordia, within twenty-two miles of Natchez, where Gaskins then resided ; that his residence was well known to Gaskins, who sued him in Mississippi, and caused him to be held to bail, about the time that imprisonment for debt was abolished in that State, which was done for the purpose of harassing and oppressing him. That after being arrested, he was advised that the law requiring bail had been repealed, and that the bail was not responsible. That he consequently left the State of Mississippi where he had been on a casual visit, and where he had no estate, without ever having engaged any counsel to defend said suit, and with the firm purpose not to do any act by which Gaskins could obtain a judgment in that State to bind him in Louisiana, because, *first*, it was a vexatious suit, and *secondly*, because the drawers of the note resided in Mississippi near Natchez, and were then and yet are amply able to pay said note, and because he, Miller, had never had notice of the non-payment of the note, and because he preferred being sued at his domicile where he had endorsed said note, rather than in a foreign jurisdiction. It is further alleged that, although it appears by the record that a plea was put in, it never was done by his authority or consent. That he has since heard that Baily spoke to the attorneys who put in the plea, but it was without his consent ; and he has been informed that no defence was made, nor witnesses called, nor any plea filed setting up the true defence to the note, and that, consequently, the judgment was recovered against him by fraud or mistake, and is not, as to him, *res judicata*, but is void in law, or entitled to no higher dignity than a judgment rendered by default. It is further alleged that, when Gaskins discovered that the makers of the note objected to paying, upon grounds unknown to the endorsers until afterwards, he became infuriated, and made threats that he would put all the parties to all the cost and trouble that he could, and that, although the laws of Mississippi required that the drawers and endorsers shall all be sued together, he brought suit separately against the several parties ; that the endorsers, being sureties only, made no effort at any real defence ; that long after suit was instituted

against him, he discovered, for the first time, that the original consideration for the note endorsed by him was vicious and unlawful, in this, that it was executed by Baily and his sureties for four negro slaves introduced into the State of Mississippi, by Gaskins, for sale and as merchandise, in violation of the constitution of that State, and that the said note was tainted with usury. The petitioner further asserts, that he has since been advised by Baily not to pay the judgment, that he has prosecuted a writ of error to the High Court of Errors and Appeals of the State of Mississippi, it being the court of the last resort, and that the judgment recovered by Gaskins on the note has been reversed; and thus said judgment is forever barred, and the illegality of the consideration established.

The motion to dissolve the injunction for want of equity on the face of the papers, assumes as true the allegations in the petition or bill. The question then is, whether the petition in this case discloses sufficient grounds in law, to arrest the proceedings on the summary process issued upon the foreign judgment.

The Code of Practice authorizes the issuing of executory process upon judgments rendered in other States, when they have acquired the force of the thing adjudged, unless it appear that they were rendered by default or upon attachment, in which cases resort must be had to the ordinary action. Code Pract., arts. 746, 747.

If the question before the court were, as to the validity and conclusiveness of the judgment pronounced in the State of Mississippi, under the circumstances disclosed in the petition, we should not be disposed to contest the principle laid down by the judge of the District Court, that we cannot go behind the judgment recovered in a sister State when the party has been personally cited to appear, or has appeared either in person or by counsel; and that a judgment rendered, as this appears to have been, is *res judicata*, the party having had an opportunity to avail himself of his legal defences. But the question appears to be, not so much whether the plaintiff would be entitled, *via ordinaria*, to recover on the transcript of this judgment or record, as whether it authorizes the issuing of summary process according to the provisions of the Code. The plaintiff in the injunction swears that he never employed counsel, nor authorized any to appear for

him. We think it clear that a defendant is not bound to enter an appearance unless he thinks proper, and equally clear that he may disown an attorney who has assumed to appear for him. It must be taken as true, then, that there was in fact no appearance in the case in Mississippi by the plaintiff with his consent; and although, apparently, he was represented, and the judgment pronounced contradictorily with him, yet in truth it was no better than if a judgment by default had been taken for want of an appearance. The defendant in the injunction, in addition to the motion to dismiss, pleads to the merits, if the motion should be overruled, and puts the facts in issue. But the case went off below upon the motion to dissolve, and we cannot inquire into the merits. Whether the note, therefore, was given for an illegal consideration, and whether the highest court in Mississippi has or has not released the principals by a final judgment upon a writ of error, are questions which do not properly arise in the present stage of this case. Our inquiry is confined to the question, whether the judgment was rendered in Mississippi against the plaintiff in injunction, in such a manner as to authorize the issuing of summary process according to the Code of Practice.

Those provisions of the Code of Practice which introduced the summary proceedings to enforce judgments in other States, instead of the ordinary action upon the record, which was formerly the only mode of proceeding known to the law in this State, and is believed yet to be in most of the States, must be strictly pursued, and the party resorting to so harsh a remedy must show that he comes clearly within the law, not only in appearance but in reality. An inspection of the record from Mississippi shows, it is true, that counsel appeared for the defendant in the case; but he swears (and we are to take what he says as true,) that they were unauthorized by him. It is not pretended, indeed, that the plaintiff knew of the want of authority in the attorneys, and consequently no fraud is imputable to him; but he makes his motion to dissolve the injunction even upon the hypothesis that there was not, in fact, an appearance on the part of the present plaintiff in that case. Under such circumstances we think the judgment ought not to have, against the defendant, any greater force than if rendered after personal service, but

Benton v Roberts.

without appearance, and upon a judgment by default; and, consequently, that the summary proceeding ought to remain arrested until after a trial upon the merits.

It is, therefore, ordered that the judgment of the District Court be reversed; that the motion to dissolve the injunction be overruled, and the injunction reinstated; and that the case be remanded for further proceedings according to law, the appellee paying the costs of the appeal.

WARREN M. BENTON v. ABNER C. ROBERTS.

APPEAL from the District Court of Carroll, *Curry, J.*

MARTIN, J. The defendant is appellant from a judgment in a possessory action. He assigns as errors apparent on the face of the record: *first*, that the court erred in overruling his exception to the sufficiency of the petition; *second*, that he was improperly ruled to trial; *third*, that the court erred in refusing a new trial.

I. The defendant urges that the petition does not state in what capacity the plaintiff institutes this suit. It states that the plaintiff had the right of possession, and that the defendant dispossessed him. This is, in our opinion, sufficient.

II. The second assignment of error is presented to us in a bill of exceptions, which states that the defendant was ruled to trial in the absence of his witnesses, who did not answer when called, he being ready to make affidavit of the materiality of their testimony, and the witnesses having been summoned. The court ordered the trial to proceed, expressing its opinion that the suit was merely a possessory one, in which the possession was alone at issue, which was admitted by the defendant in his answer; and that there was nothing for him to prove in his defence, the plea of title having been stricken from his answer.

The judge, in our opinion, erred. The continuance ought to have been granted, on the affidavit which the defendant offered to make. His answer contained no admission of the allegations in the plaintiff's petition, but, on the contrary, averred the possession

Succession of Augustus Ludewig—Linderman and others, Appellants.

of the defendant, which, if established, would have disproved that of the plaintiff.

III. The opinion which we have just expressed as to the trial, renders it useless to inquire whether a new trial was correctly refused.

It is, therefore, ordered, that the judgment be annulled and reversed, the verdict set aside, and the case remanded for further proceedings; the plaintiff and appellee paying the costs of the appeal.

Hyams, for the plaintiff.

Browder and Dunlap, for the appellant.

SUCCESSION OF AUGUSTUS LUDEWIG—BENJAMIN LINDERMAN
and others, Appellants.

The right of children to attack donations made by their parents which exceed the disposable portion, accrues only after the death of the latter; for they might survive all their forced heirs, in which event all donations would be valid and binding.

APPEAL from the Court of Probates of Ouachita, *Lamy, J.*

Copley, for the appellants.

McGuire, contra.

MORPHY, J. The petitioners, who were the children of Marie Barbe Ludewig, by a former marriage with Conrad Linderman, their father, represent: That, in making the inventory of the estate of Augustus Ludewig, her last husband, the Probate Judge has placed on it one-third of the property of their mother, which, in her marriage contract with the deceased, she made a donation of to him; that the estate of the deceased is embarrassed, if not insolvent; and that it will become absolutely necessary to make a sale of all the property belonging to it for the purpose of paying his debts. They allege that the donation thus made to the deceased by their mother, is illegal and void, and they pray that the same may be cancelled and annulled, and that the item of one-third of the property of their mother may be struck from the inventory, as forming no part of the estate of the said Augustus

 Succession of Chauncey Goodrich—Copley, Appellant.

Ludewig. Marie Barbe Ludewig, who had been appointed curatrix of her late husband's estate, answered, acknowledging the petitioners as her children, and joined in their prayer to have the donation annulled; but the attorney for the absent heirs, and Bernard Hemken, a creditor of the deceased, who intervened in the suit, excepted to the jurisdiction of the court, and to the right of the petitioners to bring this suit, they being without any interest or right of action during the lifetime of their mother. These exceptions having been sustained, and the suit dismissed, the petitioners have appealed.

We have no hesitation in saying that the decision complained of is correct. Could the Court of Probates even entertain jurisdiction of the subject matter of this petition, it is clear that the plaintiffs are without interest in the premises. They sue as the legal heirs of their mother, who is yet alive. *Nemo est hæres viventis*. Their right to attack donations made by their mother, if they exceed the portion which she can legally dispose of, will accrue only at her death, for she might possibly survive all her forced heirs; and, in that event, all donations made by her would be valid and binding on her. She would not be listened to in an attempt to impugn her own deed. Code of Pract. arts. 15, 924, 925. Civ. Code, art. 895. 11 La. 388.

Judgment affirmed.

3r	100
48	483
3r	100
52	186

SUCCESSION OF CHAUNCEY GOODRICH—GEORGE W. COPLEY,
Appellant.

A Court of Probate is competent to determine a question of title where it arises collaterally, and its examination becomes necessary to enable it to arrive at a correct conclusion on matters within its jurisdiction. As where, in an action against a curator for the amount of certain notes executed by the deceased, title to the notes is set up by a third party. In such a case, the Court of Probates will decide who is the real creditor of the succession.

APPEAL from the Court of Probates of Ouachita, *Lamy, J.*
MORPHY, J. The petition sets forth, that the estate of Chaun-

cey Goodrich is justly indebted to the petitioner, George W. Copley, in the sum of \$1875, being the amount of two promissory notes executed by the deceased in favor of one Jacob M. Baker, as the consideration of a tract of land sold to him by the payee; that by virtue of a judgment obtained by the petitioner against Baker, the sheriff of the parish of Ouachita levied upon and sold the two notes, which were purchased by the petitioner on the 10th of April, 1841; that he submitted his claim for allowance to John T. Faulk, the curator of the estate, who has refused to recognize him as the lawful owner of the two notes; that the estate of the deceased has been sold by the judge of the Court of Probates, and that the proceeds have passed into the hands of the curator, who has rendered no account whatever of the same. The petition concludes with a prayer, that judgment may be rendered in his favor for \$1875, with interest and costs; and that Faulk be compelled to give an account of his administration. The curator declined answering to the merits, alleging that the debt claimed does not belong to the petitioner, but to himself (Faulk) individually, as he had purchased these notes before he became the curator of the estate, at a sheriff's sale, made in 1838, by virtue of an execution from the District Court for the parish of Ouachita, in a suit which he brought against Baker, as he is ready to show in a court of competent jurisdiction. He avers that the question of title to this claim against the estate, between himself and Copley, cannot be inquired into by the Court of Probates. He prayed for the dismissal of the suit, which, having been ordered by the court, Copley has appealed.

The judge, in our opinion, erred. It is true that the Court of Probates is without jurisdiction to try directly a question of title; but, in the present case, Copley's claim is for a sum of money against an estate administered by a curator, a matter of which that court has exclusive jurisdiction. In order to decide upon the claim, the court must determine whether the petitioner, or Faulk, is the real creditor of the estate. This case comes clearly within the exception we have frequently recognized, that where a question of title arises collaterally, and an examination of it becomes necessary to enable the Probate Court to arrive at a correct conclusion on matters within its jurisdiction, such inquiry must be

gone into. 5 Mart. N. S. 217. 6 Ib. 305. 7 La. 378. 8 Ib. 469.

It is, therefore, ordered, that the judgment of the Court of Probates be reversed; that the plea to its jurisdiction be overruled; and that this case be remanded for further proceedings; the appellee paying the costs of this appeal.

Copley, appellant, *pro se*.

McGuire, contra.

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THOMAS M. NEWELL v. GEORGE MORTON.

An appeal will lie from an order maintaining an injunction until the succeeding term of the court. It is an interlocutory judgment which may effect irreparable injury. Defendant having obtained a judgment against plaintiff in another State, levied an execution on property of the latter in that State, the sale of which was deferred for twelve months, in consequence of not bringing two-thirds of its appraised value. Defendant, thereupon, procured an order of seizure and sale in this State, which plaintiff enjoined. On the trial, the injunction was maintained until the succeeding term, reserving to the parties the right to show whether the judgment had been satisfied out of the property originally seized, or the remedy exhausted. On an appeal by defendant: *Held*, that it is oppressive to carry on two executions at the same time, and that the judgment should be affirmed.

APPEAL from the District Court of Concordia, *Curry, J.*

BULLARD, J. This suit was commenced by an injunction, to stay proceedings upon executory process issued on a judgment recovered against the plaintiff in the State of Mississippi, on the ground that the judgment creditor had, at the time, an execution issued on his judgment in that State, and levied on property amply sufficient to satisfy the same. There was a general denial, and the court being satisfied that there was, under actual seizure, in the State where the judgment was rendered, enough property to satisfy it, and considering it oppressive to prosecute, at the same time, two executions to enforce the same judgment, maintained the injunction until the next term of the court, reserving to the parties at that time the right to show, that the judgment has been satisfied, or that the judgment creditor has exhausted his

remedy in the State of Mississippi. Morton, the judgment creditor, has appealed.

A. N. Ogden, for the plaintiff. The appeal should be dismissed. The order was a simple continuance, and no appeal can lie. 4 Mart. 605. 5 Ib. N. S. 597.

F. H. Farrar and *T. P. Farrar*, for the appellant, urged that the court erred in maintaining the injunction. Until the judgment was satisfied, the creditor was entitled to resort to his remedy by seizure and sale. 11 Mart. 733. 12 Ib. 475. 1 Ib. N. S. 207. 5 Ib. N. S. 585. 19 La. 527.

BULLARD, J. The counsel for the appellant insists that the injunction ought to have been dissolved, it having been shown that the execution in the State of Mississippi had run out. On the other hand, the appellee insists that there is no final judgment, but that the order of the court amounts to nothing more than a continuance until the next term of the court. We cannot but regard this as an interlocutory judgment, pronounced after hearing the parties, and from which an appeal may well lie, because it might operate irreparable injury.

On the merits, the evidence shows that a *fiery facias* was issued in Mississippi, that several tracts of land were levied on, but that in consequence of two-thirds of the appraised value not having been offered, they remained unsold. But it appears that they were still under seizure, when the executory process was issued on the same judgment in this State.

We concur with the District Court that it is oppressive, and against equity to carry on two executions at the same time; and we think the appellee has no good reason to complain, that the injunction was maintained for six months, especially as the right was reserved to him of showing, at the next term of the District Court, that he had exhausted his remedy in the State of Mississippi.

Judgment affirmed.

OLIVER J. MORGAN v. MARTHA A. BENTON and Husband.

APPEAL from the District Court of Carroll, *Curry, J.*

MARTIN, J. The plaintiff and appellant has placed this case before us on a bill of exceptions, to the refusal of the judge of the lower court, to admit the testimony of Selby. The suit was brought on a charge of the concealment, by Martha A. Benton, of property of the estate of her former husband. The witness was objected to by the defendants' counsel on the ground of interest, although he stated, on his *voir dire*, that he was not interested, directly or indirectly, but added that he was counsel of M. A. Benton, at the time of the alleged concealment, and had since charged her with intermeddling in a suit brought by him.

The counsel of the defendants and appellees has contended that the bill of exceptions does not state that the witness was rejected at all, or that the refusal to swear him was at his own request, on the ground of his having been the counsel of M. A. Benton. The bill of exceptions expressly states that the defendants' objected to the introduction of the witness' testimony on the score of interest. It is true, it is farther stated, that the witness mentioned that he was counsel of M. A. Benton. As the judge below subscribed a bill of exceptions, taken by the plaintiff, to his opinion on the objection of the defendants to the admission of a witness offered by the plaintiff, it is clear that this opinion was adverse to the plaintiff and sustained the defendant's objection. The mention by the witness of his being the counsel of M. A. Benton, does not establish that he objected to being sworn on that account; and his delicacy may well be supposed to have prompted him to declare his relation to her.

The judge, in our opinion, erred, in sustaining the defendants' objection to the witness on the score of interest, while there was not only no proof of such interest, but it was denied on the *voir dire*. There was nothing in the objection to him, on the ground of his having been of counsel.

It is, therefore ordered, that the judgment be reversed, and the case remanded with directions to the District Court not to reject

Lynch v. Benton and Husband.

the testimony of Selby ; the defendants and appellees paying the costs of the appeal.

Willson, for the appellant.

Hyams, contra.

JOHN B. LYNCH v. MARTHA A. BENTON and Husband.

Parties are always allowed to exercise their own judgment, as to the order of introducing their proofs.

APPEAL from the District Court of Carroll, *Curry*, J.

MARTIN, J. The plaintiff and appellant has placed this case before us, on a bill of exceptions to the opinion of the judge *a quo*, refusing to admit Selby as a witness. This bill is literally like the one taken by the plaintiff in the case of *Morgan v. Benton, &c.*, just decided. Our judgment must be consequently the same.

The defendants' counsel, however, has drawn our attention to the absence of any evidence of the plaintiff being a creditor of the estate of the former husband of Martha A. Benton, who is sued on a charge of having concealed part of the property of the estate. As parties are always allowed to exercise their own judgment in regard to the order of introducing their proofs, the defendants cannot avail themselves of the absence of evidence of the interest of the plaintiff in the estate.

It is, therefore, ordered, that the judgment be reversed ; and the case is remanded, with directions to the District Court not to reject the testimony of Selby ; the defendants and appellees paying the costs of the appeal.

Willson, for the appellant.

Hyams, contra.

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JOHN CAMPBELL v. HIS CREDITORS.

Under art. 722 of the Code of Practice, 'the creditor acquires, by the mere act of seizure, a privilege on the immoveable or moveable property seized, which entitles him to a preference over other creditors, unless the debtor has been declared a bankrupt previous thereto. If the seizure created a privilege only where the property of the debtor was sufficient to pay all his debts, it would only attach when it would be useless.

Art 301 of the Code of Practice, which declares that the "sheriff may be enjoined from paying the claim of the plaintiff out of the proceeds of the sale of the property seized, if a third person oppose such payment, alleging that the defendant has no other property to pay his debts, and pray that the proceeds may be brought into court, to be distributed among all the creditors of the defendant, according to the order of their respective privileges or hypothecations," makes a provision in favor of the creditors who have a *higher privilege* than that of the seizing creditor. It directs the proceeds to be divided among the creditors according to their respective privileges and hypothecations, including the privilege obtained by the seizure.

APPEAL from the District Court of Ouachita, *Boyce, J.*

MARTIN, J. Bailey, one of the creditors of the insolvent, is appellant from a judgment sustaining an opposition to the privilege allowed him by the syndic,* and ordering him to be placed on the tableau as a chirographic creditor. His claim results from a judgment, on which he obtained an execution which was levied on the goods of the insolvent. After the commencement of the sale, it was stopped by the sheriff, on the production of an order staying all proceedings against the person and property of the defendant in the execution. The counsel of the appellee has referred us to arts. 1980, 3149—3152 of the Civil Code, and to the Code of Practice, arts. 301, 722. It appears to us that there is nothing in the articles of the Civil Code to which we have been referred, to sustain the opposition to the plaintiff's place on the tableau; and that the two articles of the Code of Practice cited, establish his claim to the privilege. Article 722 provides, that, "the creditor, by the mere act of seizure, is invested with a privilege on the moveable and immoveable property thus seized, which entitles him to a preference over other creditors, unless the debtor has become bankrupt previous to the seizure." It is clear that the insolvency or bankruptcy did not occur previous to the seizure,

* The syndic allowed him a preference on the proceeds of the property seized.

Campbell v. His Creditors.

since the sheriff had proceeded in the sale of the property seized, and several days must have elapsed between the seizure and the sale, as the legal advertisements are shown to have been made. The order for the stay of proceedings was produced to the sheriff, before the petition on which it was granted had been filed in the clerk's office. Article 301 provides, that the "sheriff may be enjoined from paying the claim of the plaintiff out of the proceeds of the sale of the property seized, if a third person oppose such payment, alleging that the defendant has no other property to pay his debts except that which has been seized, and pray that the proceeds of the sale may be brought into court, to be distributed among all the creditors of the defendant, according to the order of their respective privileges or hypothecations." This article makes a provision in favor of creditors who have a higher privilege than the plaintiff in the execution, for it directs the money to be brought into court to be divided amongst the creditors according to their respective privileges and hypothecations, which certainly includes the privilege obtained by the seizure.

The counsel for the appellee has, however, contended, that the insolvent had become a bankrupt before his application for a stay of proceedings; that there are two kinds of bankruptcies or insolvencies, the *actual* and the *declared*; that the first results from the inability of the debtor to pay all his creditors. If the seizure created a privilege in those cases only in which the property of a debtor is sufficient to pay all his debts, the privilege would only attach in those cases in which it would be needless.

It is, therefore, ordered that the judgment be reversed; the opposition to the plaintiff's place on the tableau overruled; and that the opposing creditor and appellee pay the costs in both courts.

McGuire, for the appellant.

Copley, contra.

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MARY ELLEN LONG v. WILLIAM LONG.

The exception *litispendência* must be pleaded in *limine litis*. Where it is not pretended that judgment has been rendered in the first suit, it cannot be admitted in bar.

APPEAL from the District Court of Natchitoches, *Campbell, J. Hyams*, for the plaintiff. No counsel appeared for the appellant.

MARTIN, J. This action is brought on a notarial act for the sum of eleven hundred dollars. The defendant resisted the claim, on the ground that he had received five hundred dollars only; and he propounded interrogatories to the plaintiff, who admitted, in her answer, that she had paid that sum only, but stated that the balance was a remuneratory donation made to her by the defendant, in consideration of the sacrifices she had made in leaving her home, at her own expense, in order to live with him, and that at the time that she paid him the five hundred dollars, she did so under the idea that he would add thereto, and put her in business.

The defendant farther resisted the claim, on the ground that the plaintiff had already brought suit against him for the five hundred dollars she had paid to him. There was judgment against him, and he has appealed. It does not appear to us that the District Court erred. The defendant appealed to the conscience of the plaintiff, and she answered that the excess of the sum for which the mortgage was given, was a remuneratory donation as she believed; and that this was also the idea of the defendant, results from the circumstance of his not pretending that this excess was intended as an usurious allowance for the loan. Indeed, the plaintiff's answer shows that the five hundred dollars were not loaned by her, but placed as a deposit in the defendant's hands; and her answer further shows, that she was entitled to some compensation for the sacrifices she had made for the defendant at his request.

The suit which the defendant alleges has been brought against him for the money deposited, is not pleaded as an exception of *litispendência*; and as it is not pretended that judgment was had in it, it cannot be admitted as a bar.

Judgment affirmed.

WILLIAM TRENT v. JOHN CALDERWOOD.

APPEAL from the District Court of Ouachita, *Willson*, J.

McGuire, for the plaintiff.

Garrett, for the appellant.

MARTIN, J. The defendant is appellant from a judgment, by which the plaintiff has recovered from him the price of several lots of ground in the town of Monroe. He resisted the claim on the ground, that the title to the premises was not in the plaintiff, his vendor, who, before the sale, had transferred it to his wife. The sale, under which the claim is made, is an authentic one, in which the plaintiff and his wife sell the premises to the defendant, and concludes with her renunciation of all her claims thereon for the restitution of her dotal and paraphernal property.

The act shows that the defendant executed his notes, payable to the plaintiff, for the consideration of the sale. The record shows that the plaintiff had theretofore sold the premises to his wife, in discharge of a donation he had made to her by their marriage contract. The defendant contended that the wife became a party to the act, for the sole purpose of renouncing any right or claim to the premises, on account of her dotal or paraphernal rights. This is in direct contradiction of the first part of the act, in which it is stated, that the plaintiff and his wife, duly authorized by him, sell the premises to the defendant.

Judgment affirmed.

Campbell v. Briggs and others.

LEWIS CAMPBELL v. CHARLES BRIGGS and others.

The discovery, since the final decision of the appellate court, of new evidence tending to establish allegations in the original petition, is no ground for enjoining the execution of the judgment. The matter is *res judicata*.

THE plaintiff is appellant from a judgment of the District Court of Concordia, *Curry, J.*

Garrett, for the appellant.

Stacy, for the defendants.

BULLARD, J. This is an injunction to restrain the execution of a judgment, rendered by this court at the last October term. See 19 La. 524.

A reference to the report of the case will show the questions at issue between the parties, and the grounds of our decision. Among other things, it will appear, that a mutilated record, from a court in the State of Mississippi, in which the judgment against the present plaintiff was originally recovered, which had been admitted by the court of the first instance, was considered inadmissible by this. The plea of the defendant in that case and plaintiff in this, was, therefore, overruled.

The present injunction was obtained on the allegations: *First*, That the claims upon which the suit of Briggs, Lacoste & Co. was founded, is, and was at the institution of that suit morally, justly, and legally paid, by a legal and proper levy upon unincumbered property of greater value than the amount claimed. *Secondly*, Because the evidence of such fact was not within the knowledge of the petitioner, at the time of the trial in Concordia, but has since been returned into court in the county of Madison, and there exists full, complete, and conclusive at this time. The plaintiff prays that the injunction may be made perpetual; that the defendants may be restrained from ever enforcing the judgment enjoined; and for damages.

To this petition the defendants, Briggs, Lacoste & Co., answered, that all the matters and things set forth therein were pleaded

as matters of defence in their suit against the plaintiff, in which suit judgment was rendered in their favor by the Supreme Court; and they set up that judgment as *res judicata* between the parties. They further allege that, if there be any matters of defence contained in the petition which were not pleaded in the answer to the original suit, they ought to have been pleaded, and must now be considered as waived.

We are of opinion the court did not err in sustaining this plea, or exception. All the grounds for perpetually enjoining the defendants from enforcing the judgment pronounced by this court in their favor, were proper means of defence in the first suit, and were, or ought to have been pleaded, and the judgment cannot now be opened to let them in. It is true, the party swears, that he has at this time a full and complete record from the court in Mississippi, in lieu of the imperfect one which was rejected as inadmissible. But that only shows that new evidence has been discovered, tending to prove an allegation contained both in the answer to the first suit and in the petition in this case, to wit, that the judgment creditors had taken out an execution in Mississippi, and that property of the principal debtor had been seized sufficient to satisfy the judgment. It is not alleged that any thing has occurred, since the judgment was rendered, which releases the plaintiff from his obligation to pay it; and this is manifestly an attempt to open a judgment pronounced in the last resort, for the purpose of introducing new evidence in relation to matters set up in defence, upon which the court had already pronounced, which cannot be countenanced by this court.

Judgment affirmed.

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ELIZABETH GRIFFING and others, Heirs, v. ROBERT H. BOWMAR.

Where an appeal is taken, after the lapse of twelve months from the day on which final judgment was rendered, by one who alleges in his petition of appeal that he is a non-resident, and the allegation is denied, the case will be remanded to try the issue; and until the judgment rendered thereon, and the evidence on which it is based, is sent up, no opinion will be pronounced on any other point in the case.

APPEAL from the Court of Probates of Ouachita, *Lamy, J.*

GARLAND, J. A motion is made by the defendant to dismiss the appeal in this case :

First. Because it was taken after one year had elapsed.

Secondly. Because another appeal was taken and dismissed, and the appellants have no right to a second.

Third. Because the service of citation is insufficient.

Fourth. Because the record is defective, not containing all the proceedings had in the cause.

Fifth. Because it is not a fact, that two of the parties, Griffing and wife, reside in Indiana, or are absent from this State.

In the petition of appeal, Elizabeth Griffing and John B. Griffing, her husband, and Nancy Ward, are stated to be residents of Indiana. They did not join in the first appeal, and being, as they say, non-residents, have two years within which they may appeal. The defendant denies that Griffing and wife are non-residents. To be able to decide whether these persons are entitled to take an appeal, after the lapse of twelve months, it is necessary for us to know whether they are residents of this State, or not. This cannot be decided, except by sending an issue to be tried by the court from whence the appeal is taken, and by having the judgment rendered thereon certified to us with the evidence on which it may be based. The issue is, are John B. Griffing and Elizabeth his wife, who are appellants in this case, residents of the State of Louisiana, or not? 4 Mart. N. S. 614. 6 Ib. 161, 307. 10 La. 438. The allegation of Nancy Ward, another of the appellants, that she is a resident of Indiana, is not put at issue by a special denial; we, therefore, take it for granted that she is a non-resident.

Until the return of the decision of the Probate Court upon the

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issue joined, it will not be proper to express an opinion upon any other point in the case.

It is, therefore, ordered, that the question at issue be remanded to the Probate Court of the parish of Ouachita, with directions to the judge thereof to try, and decide the same, and certify his judgment, and the evidence taken on the trial, into this court, as soon as practicable. The costs of this proceeding to abide the decision to be hereafter rendered upon the case.

M'Guire, for the appellants.

Copley, and *Garrett*, contra.

SAME CASE.

The general doctrines relative to the interruption of prescription, do not apply to the period fixed by art. 593 of the Code of Practice, after which no appeal will lie. No appeal can be taken after the expiration of that time, though one, may have been dismissed, which was taken within the period.

When the period has elapsed within which a party might have appealed, he will not be allowed to contest his rights in the name of another appellant.

Third persons, not parties to the suit, who allege themselves aggrieved by the judgment, to whom the right of appeal is given by art. 571 of the Code of Practice, are entitled to avail themselves of every thing in the record affecting their rights.

THE testimony taken before the Court of Probates, on the trial of the issue sent down, having established that the appellants were non-residents, this case came up for examination on its merits.

GARLAND, J. On the 30th of August, 1830, the mother of the plaintiffs, acting as the administratrix of her deceased husband, presented her petition to the Court of Probates, representing the estate as largely indebted, and as having no means of paying the debts, except by a sale of the property; she, therefore, prayed for a family meeting, and a sale of the real and personal estate. The judge ordered a family meeting to assemble on that day, which was held. The meeting recommended a sale, and the judge immediately homologated the proceedings, and entered up a judgment directing the sale. On the 1st of October of the same year, a sale of the succession was made, and Abraham Guice became the pur-

chaser for \$770, payable at different terms. Guice afterwards sold the land to Bowmar, who, in January, 1837, applied to the Court of Probates for a monition, under the act of the legislature of 1834. B. & C. Dig. 585. To this application, Benjamin A. Ward, who was a minor at the time of the sale, having no representative but his mother, and Mary B., the wife of Thomas Smith, who was of age at the time, made opposition, and alleged :

First. That at the time of his death, John Ward left two major, and two minor heirs. That the major heirs were not notified of the application of their mother to sell the property, nor of any of the proceedings. That the minors were without any tutor or other legal representative to attend either to the inventory, family meeting, or sale.

Second. That the family meeting was null and void, having been held *instante*, and without notice, when a notice of three days was required.

Third. That there was no legal advertisement of the sale, there having been but thirty-one days between the judgment and sale.

Fourth. That there is only a memorandum of sale, the Parish Judge not having certified that he made it.

They, therefore, pray that the sale to Guice may be annulled, and the land declared to belong to the estate of their father. To this petition, or opposition of the heirs, Bowmar filed an answer, denying generally all their allegations, and further stating that he had purchased of Guice, and citing his heirs in warranty. Their legal representative appeared, and in a petition of intervention, set forth all the material matters heretofore stated, and alleged the legality of the sale, and other matters in avoidance of the claim of Bowmar against the heirs.

All the mortuary proceedings in relation to the estate of John Ward were given in evidence, and, after hearing the parties, the Probate Judge dismissed the oppositions of the two heirs and homologated the sale. From this judgment they appealed. This appeal was dismissed for various causes. 12 La. 571.

The same opponents afterwards took another appeal, in which they were joined by Nancy Ward, and Elizabeth, the wife of Griffing, the two other heirs, residing in Indiana, who allege an interest in the case.

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This appeal the counsel of Bowmar and Guice move to dismiss, for the reasons stated in the opinion given at the last term of the court. *Supra*, p. 112.

As to Benjamin A. Ward and Mary B., the wife of Smith, the appeal must be dismissed, more than one year having elapsed since the rendition of the judgment, they being residents of this State; but as to the two appellants, who reside in Indiana, the case is different, as they have two years within which they can prosecute their appeal (Code of Pract. art. 593); and, being interested, they have a right to appeal, although not parties in the inferior court. Code of Pract. art. 571. The counsel for the two appellants residing in this State urge, that the prescription of one year ought not to apply to them, as they interrupted it by taking the appeal which was dismissed; and, further, that they can come into court under the protection of their co-defendants. We cannot assent to either proposition. We know of no law that recognizes an interruption of the prescription of one year against an appeal; nor do we think the general doctrines in relation to the interruption of prescription apply to such a case. The assumption, that a party can contest his rights in this court, in the name of another, when he cannot be heard himself, is utterly untenable, as we recently had occasion to decide in the case of *Field v. Mathison, Executor, ante*, p. 38.

The second ground for a dismissal, does not apply to the parties now before the court.

Upon the third ground, it is only necessary to remark, that we have examined the citations and returns, and think both sufficient.

The certificate of the Probate Judge shows that the record is complete, and contains all the evidence on which the case was tried in the inferior court.

The evidence taken on the issue sent from this court, at the last term, shows that the appellants are non-residents.

Upon the merits, all the grounds of objection stated in the oppositions of Benjamin A. Ward and Mary B. Smith, have been urged and relied on by the appellants now before us. The first reply which the counsel for the appellees make to them, is, that although the Code of Practice may give the right of appeal to third persons, they cannot avail themselves of the allegations

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made and evidence exhibited by the parties to the suit, in the court below. We think otherwise. The right of appeal accorded to third persons would be of no value, and perfectly nugatory, if the appellants could not avail themselves of all that is in the record, which affects their rights. If it were not so, every case in which third persons might take an appeal, would necessarily have to be remanded. They are supposed to do so under some disadvantages, as they are obliged to take the case as it is, without an opportunity of presenting their rights in their own mode, and supporting them by such testimony as might be in their possession. The present appellants are at liberty to avail themselves of all the grounds of opposition stated by those appellants who have been dismissed, but they take them burthened with all their responsibilities towards Bowmar, and the representatives of Guice.

As to the complaint that the land was not legally advertised, we think that it is obviated by the 2d section of the act of March 10, 1834, B. & C. Dig. p. 8, which makes the declaration and *procès-verbal* of the judge, evidence that a sale was made, and also *prima facie* evidence that the property was duly advertised;* this, however, the heirs of Ward may controvert, by such testimony as they can produce.

At the trial, the heirs of Ward offered in evidence a document to show that the proceedings of the Probate Judge previous to, and at the sale, were illegal. This document consisted of the petition of the administratrix, the order of the judge for a family meeting, its deliberations, and the order of the judge to sell the

* This act provides : Sect. 1. That in public sales hereafter to be made by parish judges, sheriffs, auctioneers, or other public officers, and which are, or may be required by law to be preceded by advertisement, it shall be the duty of such parish judges, sheriffs, auctioneers, or other public officers, in their *procès-verbal*, deed, or act of sale, to state the manner, time, and place of making such advertisements, which statement so required to be made shall be held to make proof of the manner, time, and place of making said advertisements, on any question that may grow out of the sale wherein the same was made.

Sect. 2. That when a question shall arise out of any public sale hereafter made by the parish judge, sheriff, auctioneer, or other public officer, and which sale was required by law to be preceded by advertisements, the fact of sale being proven, it shall make *prima facie* evidence that the required advertisements were regularly made. Acts of 1834, p. 122.

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property composing the succession, all dated on the same day. The counsel for Bowmar and Guice, then offered, on their part, the same proceedings as evidence, together with the *procès-verbal* of the probate sale, and a deed from Guice to Bowmar. To this the heirs of Ward objected, because the documents were all of the same date, and there was no prayer for the homologation of the proceedings of the family meeting, which were not attested, nor consented to by an under-tutor, and because notices were not given to any party. The judge received the papers in evidence, and the counsel for Ward's heirs, excepted. We do not think the judge erred. The objections go entirely to the legal effect of the documents, and not to their admissibility.

We are not altogether satisfied that the proceedings, which led to the sale of Ward's succession, were regular and legal; but, if they are not so, it is not impossible that the two appellants now before us, may be responsible, in warranty, for the acts of their deceased mother, who was the administratrix, and provoked the sale. It may be that the land was community property, in which event the interest of the appellants will be very small, only one-eighth each. A part of the price for which the land sold may have to be refunded, and as one (perhaps both of the appellants,) was a major at the time of the sale, and did not object to or appeal from the judgment ordering it, it is possible that prescription may be successfully opposed to their action. The present appellants were not parties to the proceedings in the Probate Court, therefore none of these questions can be finally settled. We think that justice requires us to remand the case.

To prevent an accumulation of questions, we think it best to say that we believe the principle settled in the case of *Graham's Heirs v. Gibson*, 14 La. 146, and in some other similar cases, does not apply to this. That case was an action brought in the District Court to recover property, alleging the nullity of the proceedings in the Probate Court, under which the defendant held. We said that we would not, collaterally, in another court, go behind the judgment of the Probate Court, to see if the proceedings, which led to the judgment, were regular.* This is a different

* The case of *Graham's Heirs v. Gibson*, was an action before a District Court, by the tutor and under-tutor of certain minors, in which the petitioners prayed that the

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case. The 2d section of the act of March 10, 1834, relative to monitions, (B. & C. Dig. 585,) specially directs an examination into the judgment or decree and other proceedings. This case is something similar to an action of nullity, and was commenced in the same court that gave the original decree.

The judgment of the Probate Court is, therefore, reversed, and the cause remanded for a new trial, with directions to the judge to conform to the principles herein stated, and otherwise proceed according to law; the appellees paying the costs of this appeal.

WILLIAM D. MCCOY v. WILLIAM HUNTER.

Questions of fact and claims for damages are peculiarly within the province of a jury, whose verdict will not be disturbed unless manifestly unjust.

APPEAL from the District Court of Natchitoches, *Campbell, J.*

This case was submitted without argument, by *Brent*, for the plaintiff, and *Morse and Roysdon*, for the appellant.

MORPHY J. This suit was brought to recover divers sums, amounting together to \$510, under a verbal contract to put up two gin stands in the gin house of the defendant at his plantation on Old River, in the parish of Natchitoches, and to put castings on an old main wheel of the gin, and for other work done at the special instance and request of the defendant. The defence set up is, that the work was not done in a workmanlike manner, nor within such a reasonable time as to enable the defendant to gin his cotton for market, as the plaintiff had engaged to do; that af-

minors might be decreed to be the owners, and be put in possession of lands which had been sold by order of a Court of Probates, and that the sale might be annulled. There was a plea to the jurisdiction, which was sustained below. On the appeal, the court said: "We do not doubt the right of the District Court to examine into matters of probate jurisdiction, when brought before it collaterally, and *vice versa*. But we do not deem the nullity of the probate sale to have been brought before the District Court, in this suit, collaterally; it is the head and front of the suit itself; and the court is called upon to avoid, cancel, and annul the acts of the Probate Court, which is, to our view, a direct action of nullity."

 Beard, Tutor, v. Morancy.

ter the plaintiff had commenced his work, and at the very time when by his contract he was to have finished it, and when the defendant should have been ginning his cotton for market, the plaintiff abandoned the work for seventeen days, thereby causing the defendant damage at the rate of thirty dollars a day, amounting to \$510, which, with different sums advanced to the plaintiff, or expended in employing other persons to finish his work, are pleaded in compensation or reconvention. The case was tried by a jury, who brought in a verdict of \$201 88 in favor of the plaintiff. After an unsuccessful effort to obtain a new trial, the defendant has appealed.

An attentive examination of the evidence has left on our minds the impression, that the plaintiff has shown little skill or diligence in the performance of his contract with the defendant. Yet, as we have repeatedly said, questions of fact and claims for damages are so peculiarly within the province of the jury, that we will not interfere, unless there be gross and manifest injustice done to one of the parties. In this case we have seen nothing of the kind. The defendant has been allowed as an offset, most of the sums he expended for the plaintiff. As to the damages claimed in reconvention, the jury have thought that, under the circumstances of the case, he was entitled to none. We cannot say that they erred.

Judgment affirmed.

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JAMES BEARD, Tutor, v. EMILIUS MORANCY.

The advice of a family meeting is not necessary, to authorize the institution of a suit by a tutor to recover real estate belonging to his ward.

An instrument, signed by a parish judge alone, purporting to be the *procès-verbal* of the sale of real estate belonging to a succession, which recites that the sale was made in pursuance of a decree of the Court of Probates in which the succession was opened, and of the advice of a family meeting, is insufficient to establish the existence of the decree.

The decree of the Court of Probates where the succession is opened, made in conformity to the advice of a family meeting, is necessary to authorize the sale of property belonging to minor heirs; and where such a decree has been made, the court will not look beyond it.

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Property of certain minor heirs having been sold by the parish judge, was afterwards seized under an execution by a creditor of the purchaser. The tutor of the heirs opposed the payment of the proceeds of the sale to the creditor, claiming a vendor's privilege for the price yet due, and setting up a mortgage given to secure the payment. In an action subsequently commenced by him, on behalf of the minors, against the syndic of the purchaser, to recover the land: *Held*, that his opposition to the payment of the proceeds to the seizing creditor, could not preclude the minor heirs from claiming the land itself.

THE tutor of the minor heirs of Samuel Clare is appellant from a judgment of the District Court of Carroll, *Curry, J.*, recognizing the validity of a sale of the tract of land in dispute, made by the parish judge of Ouachita, and rejecting the claims set up by the heirs.

Garrett, for the appellant.

Bemiss and Dunlap, contra.

BULLARD, J. This is a petitory action, in which the plaintiff, as tutor of the minor heirs of Clare, asserts title to a tract of land containing about one hundred and sixty acres, which, he alleges, was the property of their father at his decease, and of which they have never been divested. The original defendant, Morancy, disclaimed title, and alleged himself to be the lessee of one Mitchell, who, he prayed, might be made a party in his place. Mitchell came in and pleaded, and caused his warrantor, W. B. Minor, to be cited, who also answered. Minor avers that he took possession lawfully, and with just and sufficient titles, as will more fully appear by reference to the *procès-verbal* of a sale of the lot of land now sued for, made in pursuance of a decree of the Court of Probates of the parish of Ouachita, on the 4th of February, 1837, which is filed. He further pleads the prescription of five years, under the act of the Legislature relative to advertisements, approved on the 10th of March, 1834. There is a further plea to the jurisdiction of the court, which has been waived.

It appears that both parties claim under Samuel Clare; the plaintiff's wards as his minor heirs, and the defendant under an alleged sale by virtue of a decree of the Court of Probates, by which the title of the heirs was divested. The title of Clare, therefore, is admitted, and the heirship of the minors having been shown, the only question is, whether their title has been legally divested. We lay out of view the exception to the want of authority in the

tutor to institute this suit, believing that the advice of a family meeting is not necessary to authorize the institution of such an action as the present.

The defendant exhibits as evidence of his title, a document purporting to be a *procès-verbal* or certificate of the judge of the parish of Ouachita, in which he recites that, in pursuance of an order of the Court of Probates in and for said parish, and the order of a family meeting directing the sale of the land and stock of cattle belonging to the succession of Samuel Clare, deceased, he had proceeded to sell the tract of land, designated by lot or quarter section No. 37, in township No. 18, Range No. 13 east, containing 160 acres, after due advertisements, on the terms prescribed by the family meeting, when William B. Minor became the purchaser, &c.; and the parish judge proceeds to bargain, sell, transfer, and set over to the purchaser the said tract of land. This *procès-verbal* is signed by the parish judge alone, without witnesses or vendee, although it is said, in the body of the instrument, to be signed by the purchaser and witnesses.

It cannot be conceded that the recital in this instrument, that the sale was made in pursuance of a decree of the Court of Probates, is sufficient, *per se*, to establish the existence of such decree. It is not pretended that any part of the records have been lost or destroyed, and no evidence is given to show the purport of that decree, or its former existence. The judge who made the sale, and signed the *procès-verbal*, was examined as a witness. He does not say positively that such a judgment existed, but only that he does not positively recollect, as it relates to the particular order, whether he rendered the order, as parish judge, for the sale of the land, but that he is satisfied he never made a sale without an order of the Probate Court having been rendered. It appears that no such decree exists in the records at Ouachita, nor in those of the parish of Carroll, which was detached from that parish, and in which the land is situated. We are of opinion that there is no legal evidence of the existence of a judgment ordering the sale of the land of the minors, and that without such decree their title is not divested. It is true that, if we were satisfied of the existence of such a judgment, we should not look beyond it; but the defendant fails in making out this title, unless he shows the

authority of the parish judge to make the sale ; and that authority must be a decree of the Court of Probates, conformable to the advice of a family meeting. 13 La. 436. 16 La. 440.

It has been urged in argument, on the authority of *Graham's Heirs v. Gibson*, 17 La. 148, that the District Court is without jurisdiction to inquire into the proceedings of the Court of Probates. The two cases are widely different. In that, it was alleged that the order or decree of the Court of Probates was illegal ; in this, the existence of any order is denied ; in that, the District Court was called upon to go behind the judgment of the Court of Probates, and to annul or disregard it ; in this, on the contrary, the plaintiff sets up an original title, and calls in question no order or decree of the Court of Probates, but insists that without proof of such decree, the defendant has no legal title, and that theirs is not divested.

The fact that Beard, as tutor, intervened in a suit, and claimed for his pupils a mortgage and vendor's privilege on this land, after it had been sold at the suit of Fowler, does not, in our opinion, preclude the minor heirs from claiming the land itself.

Upon the whole, we are of opinion that the minors are entitled to recover the land ; but the case must be remanded for further proceedings, as between the defendant and warrantors, and as it relates to fruits and improvements.

It is, therefore, decreed, that the judgment of the District Court be reversed, and that the minors recover the tract of land described in the petition ; and it is further ordered, that the case be remanded for further proceedings as between the defendant and the minors, in relation to fruits and improvements, and as to all questions between the defendant and the warrantors ; in the mean time no writ of possession is to issue. The appellees to pay the costs of this appeal ; reserving to the defendant the right of claiming what has been paid of the price of the land to the tutor of the minors.

CHRISTOPHER H. DABBS v. BERNARD HEMKEN and another.

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The trial of an injunction is a summary proceeding, in which neither party is entitled to a jury.

In an action against a seizing creditor and the sheriff, in which plaintiff prayed for an injunction and damages, he cannot call upon the latter to testify as a witness. He must release him, or propound interrogatories to him as a party.

An amended petition propounding interrogatories to a party to the action, offered after the trial has commenced, will be too late.

As a general rule, amendments should be admitted where the justice of the case will be promoted thereby, but they must be presented before going to trial. The case must be an extraordinary one, to justify the reception of an amendment after the trial has commenced; and the amendment must not be calculated to produce delay.

The circumstance, that the sale of property seized under execution was advertised before the expiration of the three days allowed for notice of the seizure, is immaterial. Where sufficient property could not be found, or has not been seized to satisfy an execution, a further seizure may be made when the deficiency is discovered, or other property found. Where more property has been seized than sufficient, the remedy is pointed out by arts. 652 and 653 of the Code of Practice. Such an over seizure will not authorize an injunction.

A proper construction of the third section of the act of the 25th March, 1831, will not authorize the court, on dissolving an injunction, to increase the interest, where the original judgment bears interest at ten per cent a year. Whatever else it may be proper to allow, must be in the form of damages.

APPEAL from the District Court of Ouachita, *Boyce, J.*

Copley, for the appellants.

McGuire, contra.

GARLAND J. The plaintiff avers that Stevens, the sheriff of the parish of Ouachita, had levied on certain property under two executions in favor of Hemken, and was about to sell it contrary to law. He alleges:

First. That the sheriff refused to seize several tracts of land in the parish when pointed out to him by the present plaintiff, but insisted on taking other property, moveable and immoveable, and advertised it for sale.

Second. That the sheriff did not wait three days before advertising the property for sale.

Third. That the sheriff has not three executions in favor of Hemken, but only two.

Fourth. That the property first seized was sufficient to satisfy

the executions, and the seizure of more was illegal and oppressive, and unnecessary to pay the debts.

Fifth. That he has a judgment in the Parish Court against Hemken, which he is entitled to compensate against one of the judgments on which execution had issued.

Sixth. That the sheriff had no right to make an additional seizure of property, without first calling on the petitioner, and giving him notice ; and that seizing contrary to his will, is illegal.

Seventh. That the sheriff has advertised the property for sale for cash, whereby he will be deprived of the benefit of appraise ment.

He prays for an injunction, and judgment, *in solido*, for \$3000 damages, against Hemken and the sheriff.

The property seized, consists of two houses and lots in the town of Monroe, a slave, and a twelve months' bond given to Dabbs for about \$650, with interest.

The defendants answer, that Dabbs did not, at the time the seizure was made, point out the land mentioned in the petition ; that he has no right or title to it ; and they deny, generally, all the allegations of the petition. They pray for a dissolution of the injunction, and for damages against Dabbs, and his sureties on the bond.

George W. Copley then presented a petition of intervention, setting up a title in himself to the twelve months' bond, under a transfer made before the seizure, and asking a judgment for it, and \$500 damages. This intervention the judge would not permit to be filed, on the ground, that it was an indirect mode of obtaining an injunction, without an affidavit, or giving bond and security, to which opinion Copley excepted. This was at the October term of the court in 1841, and the intervenor did not then appeal from the judgment against him.

At the April term, 1842, the cause came on for trial, when the plaintiff called on Stevens, the sheriff, to testify in the case. This was objected to, as he was a party to the suit, and a heavy claim made against him for damages. The plaintiff did not offer to release him, but offered to file an amended petition, to which he attached certain interrogatories, the purpose of which was to learn from the sheriff whether he (Dabbs) did not, when called on, point

Dabbs v. Hemken and another.

out the land mentioned, and show a patent for it. The sheriff was then in court. This the court rejected as being offered too late; the judge stating in the bill of exceptions, which was tendered and signed, that the petition was offered after the trial had begun, and the plaintiff had introduced a considerable portion of his testimony.

The injunction was dissolved, and a judgment for interest and damages given against Dabbs, and Copley and Jessup, his sureties, from which judgment they all have appealed.

In this court, Copley urges, that the court erred in rejecting his petition of intervention, and insists upon his bill of exceptions. The counsel for the defendants argues that, we cannot notice it, as Copley is not an appellant from the judgment refusing to receive it. The latter contends that he is, and refers us to the petition of appeal and bond to sustain him. In the former, Dabbs, Copley, and Jessup join, and pray for an appeal from a final judgment rendered against them at the term of the court in April, 1842. In the bond, they all bind themselves as principals, and state that they have appealed from a final judgment rendered against them, on the 30th of April, 1842. Not a word is mentioned either in the petition of appeal, or bond, about the intervention, or judgment rejecting it, in October, 1841. The claims of Copley, as set forth in his petition, are adverse to the interests of both Dabbs and Hemken, and it would be no more than right, if it were his intention to appeal, and thereby affect the rights of either, that he should give bond and security to indemnify them. The bond filed in no manner affords such indemnity.

From all the circumstances, we are bound to conclude that Copley is not an appellant from the judgment rendered against him, on his intervention, and cannot be heard in support of it now.

In the inferior court, the plaintiff offered an amended petition, praying that his cause might be tried by a jury. This was refused, and the plaintiff excepted.* The judge did not err. It is evi-

* The judge rejected the amended petition, on the ground that the proceeding was a summary one, in which the parties were not entitled to a jury.

dent that this was an effort to continue the cause, and obtain delay. The repeated decisions of this court, and positive legislative enactments sustain the decision of the District Judge. The claim of a constitutional right to a trial by jury in all controversies, where the amount exceeds twenty dollars, has been so long settled by this court, that it is unnecessary to comment on it now.

As to the bill of exceptions to the refusal of the judge to have Stevens sworn, as a witness, we are of opinion that he decided correctly. Stevens was not a nominal party merely. A claim for \$3000 damages exists in the petition, which the plaintiff made no offer to release, and here, he still insists, that the sheriff was a trespasser. It is clear that the plaintiff had no right to call on him to testify against himself.

The amended petition was, we think, properly rejected by the judge. The cause had been at issue six months. The trial had progressed until the plaintiff had presented a considerable portion of his testimony; the amendment did not propose to set forth anything with which the plaintiff was previously unacquainted, but was only intended to appeal to the conscience of one of the defendants, after it was found that the action must otherwise fail. There was no prayer that the defendant should answer immediately in open court, although the bill of exceptions states that he was present. Had the amendment been received, the plaintiff might have insisted that the answers should have been reduced to writing, and have claimed to except to them, and have thereby interrupted the trial, and, perhaps, postponed it until the next term of the court. As a general rule, amendments should be admitted when the justice of a case will be promoted thereby; but they ought to be presented before fixing the cause for trial, or at any rate, before going into it. The case must be an extraordinary one, that will justify the reception of an amendment after the trial has commenced, and such amendment must not be calculated to produce delay. Parties must take the necessary measures to have their pleadings and evidence prepared previous to going to trial; and neither should be afterwards permitted, on finding his evidence insufficient, to present amendments and propound interrogatories to his adversary, in the desperate hope of sustaining his

case by the answers of the latter, after all other means have failed. If such a practice were permitted, the trial of nearly every contested case would be interrupted by one party or the other, and continual delays interposed to the regular business of the courts.

There is no evidence in the record to establish that the plaintiff in the injunction, ever pointed out to the sheriff any property which he refused to seize; and this omission is somewhat remarkable, as the seizure of a part of the property was made by a deputy sheriff, who was no party to the injunction, and was not called on as a witness.

The second ground stated in the petition cannot be sustained. One seizure was made on the 20th of May, 1841, the other on the 8th of June, and the property was advertised to be sold on the 17th of July. More than the necessary delay between the seizure and sale was allowed; and it makes no difference whether the advertisement was posted up before the expiration of the three days allowed for the notice of seizure. 19 La. 300.

As to the third ground, it appears that the sheriff had in his hands two executions in favor of Hemken, and one in favor of Dufilho, under which he made the seizures, and the advertisement so states. If, in the notices of seizure, nothing be said of a seizure under Dufilho's execution, it is no reason to arrest Hemken in the execution of his judgments.

As to the fourth ground, there is no evidence to show whether, in the first seizure, the sheriff took much property or not. The value is not stated, and we can determine nothing about it.

Upon the fifth ground, the judgment alleged to have been obtained in the Parish Court has not been produced. The petition and answer are in the record, and the statement of facts mentions that the judgment was offered also, but no copy is filed. All that is before us, are statements made by the judge as to its amount. Whether the plaintiff is entitled to compensate it against the executions enjoined, we cannot determine.

The sheriff had a right to seize sufficient property to satisfy the executions in his hands. If he did not take enough at first he had a right to seize more, whenever the deficiency was discovered, or he could find property. If he took too much, articles

652, 653 of the Code of Practice prescribe the remedy. They do not authorize an injunction. The sixth ground cannot avail the plaintiff.

The seventh and last ground seems to us no better than those that precede it. We are unable to see how the plaintiff will be deprived of his right to have the property appraised, in consequence of the sheriff advertising it to be sold for cash. It is his duty to advertise and sell for cash at the first offering, provided two-thirds of the appraised value is bid. There is no pretence that the sheriff intended to sell without appraisal. The judge, therefore, did not err in dissolving the injunction.

In this court, it is alleged that there is error in the judgment of the court in the manner of allowing interest on the judgments enjoined. Interest was added to the principal of the judgments, up to the day when the executions were enjoined, and interest at ten per cent per annum allowed on those sums, until the injunction should be finally dissolved, with \$52 55 as damages on one of the executions, but no damages on the other. In computing and allowing the interest, we think the judge erred. Our views as to the allowance of interest are fully expressed in 19 La. 300, 313. When a debt bears ten per cent interest we will not increase it, but will allow, in the way of damages, whatever may be right. The defendant, also, asks us to amend the judgment in his favor, by allowing him twenty per cent damages on the whole amount of the judgments enjoined, including interest. We think it right to grant a part of his demand.

The judgment of the District Court; so far as it dissolves the injunction, is hereby affirmed, but as it relates to the allowance of interest and damages is reversed; and it is ordered, that the defendants, Hemken and Stevens, proceed on the executions enjoined, as though no injunction had been issued; and further, that Hemken have judgment against C. H. Dabbs, George W. Copley, and George Jessup, *in solido*, for the sum of three hundred dollars damages, with costs in the District Court; those of the appeal to be paid by the appellee.

SAME CASE—ON A RE-HEARING.

A slight variance between the description of the property in the advertisement, and that in the notice of seizure, which cannot mislead the debtor, is immaterial.

A RE-HEARING was granted in this case, on the application of *Copley*, for the appellants.

GARLAND, J. When this case was first before us, from the confused manner in which the record was made up, the judgment of the Parish Court of Ouachita, for the amount of which the plaintiff alleges that he is entitled to a credit, was overlooked, and, consequently, disallowed. We now find the claim to this credit to be well founded, and that it is to be applied to the execution No. 1181, for \$525 46, as a credit, on the 18th of May, 1841. The counsel for the petitioner states that the judgment and costs amount to \$105 50, for which he is entitled to credit.

As to the other parts of the judgment, no sufficient cause has been shown to induce us to change our opinion. Although there is a slight variance between the description of the property advertised and that in the notice of seizure, yet it does not appear so material as to annul the proceedings or seriously mislead the plaintiff, who was the defendant in the execution. There was, therefore, no reason for enjoining the execution No. 1143, for \$1279 42, with interest and costs.

Our former judgment in this case is therefore set aside ; and we do now order and decree that the judgment of the District Court, so far as it dissolves the injunction in relation to the execution No. 1143, be affirmed ; that so far as it relates to the injunction No. 1181, both in favor of Hemken against Dabbs, and in relation to the allowance of interest and damages, it be annulled and reversed ; and proceeding to give such judgment as ought to have been rendered in the court below, it is ordered that the sum of \$105 50 be entered as a credit on the execution No. 1181, to take effect on the 18th day of May, 1841, and that the injunction be dissolved as to the balance due on the same, and Hemken and Stevens will proceed on the executions enjoined, after giving the aforesaid credit, as though no injunction had been issued ; and

we further decree, that said Hemken have judgment against the said C. H. Dabbs, George W. Copley and George Jessup, *in solido*, for the sum of two hundred and fifty dollars damages on the amount of the execution No. 1143, with the costs in the District Court; those of the appeal to be paid by the defendant, Hemken.

ROBERT A. CRAIN v. CHARLES JONES.

APPEAL from the District Court of Rapides, *Boyce*, J.
Cochran and *Brent*, for the appellant.
Dunbar, for the defendant.

MARTIN, J. The defendant and appellee prayed for the dismissal of this appeal at our last term, on the ground that he had not been cited in the appeal. The case was continued for a citation, and he now renews his motion, on the ground, that, although the appeal was returnable to the first Monday of October, 1841, he was not cited until the 15th day of that month. The plaintiff and appellant having been guilty of great neglect last year, and having neglected to have a proper citation to the present term, cannot claim farther indulgence from us.

Appeal dismissed.

SUCCESSION OF JOHN M. A. HAMBLIN—ELIZA W. HAMBLIN,
Administratrix, Appellant.

Letters of executorship, under the hand and seal of the Judge of the Court of Probates, are conclusive evidence of the facts they purport to establish; nor can the jurisdiction of the judge be inquired into collaterally.

A case will not be remanded, after appeal, on an affidavit of newly discovered evidence.

The court cannot notice any thing which may have occurred subsequent to the date of the judgment appealed from.

A partnership formed for the purpose of purchasing timber, sawing it, and selling it for a profit, is, under art. 2796 of the Civ. Code, a commercial one.

Succession of J. M. A. Hamblin—E. W. Hamblin, Administratrix, Appellant.

THIS is an appeal from a decision of the Court of Probates of Ouachita, *Lamy*, J., and was submitted without argument, by *McGuire*, for the appellant, and *Garrett*, for the appellees.

MORPHY, J. The administratrix of the estate of the late John M. A. Hamblin, having refused to allow as a just debt, a balance of \$438 99 $\frac{1}{2}$ on a running account, claimed by Layton & Co., this suit was brought to obtain judgment against the estate for this amount. The money is alleged to be due for goods, wares, and merchandize, furnished for the special use and benefit of the commercial firm, styled "The Monroe Steam Saw-Mill Company," which was composed of the following individuals, to wit, Henry M. Bry, Solomon W. Downs, James W. Mason, John T. Faulk, and the said John M. A. Hamblin. Judgment having been rendered for the amount claimed, with interest from the date of the death of Hamblin, the administratrix has appealed.

Pending the appeal, Robert Layton, one of the firm of Layton & Co., the appellees, died, and the cause was continued to make his representatives parties to it. At this term of the court, Margaret N. Layton and Isaac T. Preston, moved to be permitted to appear in the suit as the executrix and executor of the deceased, and produced letters testamentary from the Judge of Probates of the parish of Jefferson. This motion was opposed by the appellant, who denied the capacity they assumed. She prayed that the case might be sent back to try the issue thus presented, and for the further purpose of allowing her an opportunity of proving that the late Robert Layton had acknowledged in writing that the debt sued on was not due to him by the deceased, but by J. & J. W. Mason. In support of this application, her counsel made an affidavit, setting forth certain facts, and stating that the evidence to establish them had been discovered since the trial in the Court of Probates, and since the granting of the present appeal. Letters of executorship, under the seal and signature of the Probate Judge, exhibit, in our opinion, such evidence of the fact they purport to establish, as renders any other proof unnecessary; nor can we inquire collaterally into the jurisdiction of the Court of Probates, from which these documents have issued. In relation to the motion to send back the case on the ground of newly discovered evidence, we should not feel authorized to grant it, even were the

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affidavit submitted to us much stronger than it is, as we cannot notice any thing that has occurred subsequent to the rendition of the judgment appealed from.

On the merits, the evidence clearly establishes the claim of the appellees. The articles furnished by them are shown to have been received and consumed by the Monroe Saw-Mill Company, in carrying out the objects of the partnership, of which the deceased was a member. It has been urged that the partnership was not a commercial, but an ordinary, one ; that one partner was not authorized to contract for and bind the others ; and that, if bound at all, the estate is liable only for the share of the deceased. The partnership was clearly a commercial one. It is proved that the principal business of the Company consisted in buying timber, sawing it, and selling it for profit. This, under the Civil Code, constitutes a commercial partnership. Civ. Code, art. 2796. 14 La. 244, 15 Ib, 287.

Judgment affirmed.

ELIZABETH SMALLWOOD v. DAVID C. PRATT, Sheriff, and another.

Under a judgment against a husband and wife, *in solido*, the sheriff may levy on the separate property of either.

The husband, as the head of the community, has a right to alienate its property. When done collusively, for the purpose of injuring the wife, she has her remedy against his heirs, after his death, under art. 2373 of the Civil Code, and, perhaps, after a separation from bed and board.

APPEAL from the District Court of Claiborne, *Campbell, J.*

Brent, for the appellant.

Tuomey, for the defendants.

MORPHY, J. The plaintiff has appealed from a judgment dissolving an injunction she had sued out to stay the sale of a slave, her separate and paraphernal property, seized under a *fi. fa.* issued by virtue of a judgment obtained by Harrison against her husband, William Smallwood, and herself, for a debt which she avers was not due by her, but by the community. She alleges that, under

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the said writ, a quarter section of land on the east bank of Red River, which was community property, and of sufficient value to pay Harrison's demand, was levied upon, and advertised to be sold on the 23d of January, 1841, and that on the appointed day Harrison appeared at the place of sale, and discharged the levy. She further alleges, that with a view to harrass and injure her, Harrison colluded with one Reuben White and others, and procured from her husband in Texas a fraudulent sale of the said tract of land to Reuben White, for the purpose of getting the latter to enjoin the sale of the land, and for a pretext to have her slave levied upon and sold; and that she has requested the sheriff to levy on the land, which he has done, but also seized the said slave, though knowing him to be her paraphernal property.

The record shows that the petitioner and her husband were sued on their joint note, and that a judgment was rendered against them, *in solido*, which has never been annulled or appealed from. Whatever we may think of the judgment, we cannot go behind it to inquire whether the debt was originally due by the wife, or by the community. The sheriff could, therefore, properly levy on the slave seized, admitting him to be her separate property, which, under the evidence she has adduced, may perhaps be questioned. But the appellant further complains that the tract of land, which was first levied on, was not sold to satisfy Harrison's execution, because he discharged the levy on the day of the sale. When property is once levied upon and advertised to be sold, it is doubtful whether the plaintiff in execution can, without the consent of the debtor, discharge the levy, or retard the sale, and thus continue at the risk of the latter the thing seized, which, if it be of a perishable nature, may be lost to him in consequence of such delay. But in the present case, the debtor's consent was given shortly after, for he availed himself of this release to sell the land. This sale, the appellant urges, was made by her husband, collusively with Harrison, and Reuben White, the purchaser. As the head of the community, William Smallwood had undoubtedly the right of alienating property belonging to it. If he did so fraudulently, and for the purpose of injuring his wife, she is without any immediate remedy, at least in this suit, as the law has provided for her a recourse against his heirs, after his death. Civ. Code, art. 2373. Al-

though this law seems to contemplate only the case of a dissolution of the community by the death of the husband, yet the wife would not, perhaps, be without relief, in case of a separation from bed and board, were it proved that the husband had alienated property of the community in fraud of her rights. *Tourné v. Tourné*. 9 La. 458. The evidence does not show, as alleged by the petition, that the sheriff levied a second time on the land, but only that she pointed it out to him. He may have considered that she had no right to point out property of her husband, to pay a debt for which she was personally liable. It appears, moreover, that by reason of some dispute about the title, he refused to sell the land, unless some one would give him a bond of indemnity. This Harrison declined doing, but put into his hands the slave in question. Having a writ against both the wife and the husband, the sheriff properly levied on the property thus pointed out to him.

Judgment affirmed.

JAMES M. ESTILL v. WILLIAM G. HOLMES.

A defendant will not be permitted, by shifting his grounds of defence, to contradict, by an amended answer, facts stated and admissions made by him in his original answer.

A purchaser, fully aware of the danger of eviction at the time of the purchase, cannot resist payment of the price on the ground of eviction. C. C. 2481.

Action by the payee on a promissory note. Defendant answered, pleading a failure of consideration, and alleging that the note was given in error, for the price of a tract of land, purchased by plaintiff from a person to whom defendant had previously sold it. In an amended answer, filed at a subsequent term, he averred, that the note was executed for the price of a tract of land belonging to the United States, to which plaintiff pretended to have a pre-emption right, and which he bound himself to convey by a good title to defendant; that plaintiff had no pre-emption right to the land; and that the United States had sold the land to a third person, which sale had come to defendant's knowledge, since the last term of the court. The sale by the United States was established. *Held*, that defendant could not be allowed to gainsay the admissions originally made by him, and that he must be estopped by his warranty, as vendor, from praying for a rescission on the ground of want of title in the plaintiff. Judgment in favor of the latter.

APPEAL from the District Court of Carroll, *Curry, J.*

Dunbar, for the appellant, and *Selby*, for the plaintiff, submitted this case without argument.

MORPHY, J. This is a suit by the payee, against the maker of a promissory note for \$1500. The answer admits the defendant's signature, but avers that the consideration for which the note was made has failed; that it was given for a tract of land sold to the defendant, by the plaintiff, which the defendant had himself originally sold to James A. Clarke, of Chicot county, Arkansas; that in this sale it was expressly stipulated, that the defendant should have the privilege of purchasing back his land at the rate of twenty dollars per acre, the price paid to him by Clarke; that the latter afterwards sold the land to the present plaintiff, subject to the privilege reserved by the defendant. The answer further alleges that the defendant has had great trouble and been at great expense in procuring titles to the land, but has only partially succeeded; that the plaintiff has imposed upon him, and obtained his notes for the land at fifty dollars per acre, when in truth and in justice he was only bound for twenty dollars per acre; that on a settlement of their accounts, defendant was induced to give plaintiff his notes, of which the note in suit is one, for a much greater sum than was justly due to him; that by reason of his trouble and expense in procuring titles to the land in question, the defendant has incurred damage to the amount of five hundred dollars, which he prays may be allowed in compensation and reconvention. This answer was filed at the May term, 1839. At a subsequent term, to wit, on the fourth of May, 1840, an amended answer was filed, setting up that the note sued on, together with two others of an equal amount each, was given to the plaintiff as the consideration for a tract of land which the latter promised to convey to the defendant, the title to which land was at the time of the promise in the government of the United States; that the plaintiff represented that he had a pre-emption claim which he had a right to transfer, and that he bound himself to perfect the same, and make a good title to the defendant; that since the agreement and undertaking, the land in question has been sold by the government to one Thomas L. Norris, who now claims to have the legal and rightful title to the same, and threatens to sue and evict the defendant; that this sale to Norris has been made, and has come to the knowledge of the de-

fendant, only, since the last term of the court. The amended answer further alleges, that, at the date of the notes given for the land, the plaintiff had no title or preference right whatever to purchase the same; that even if he had any, he could not legally sell or transfer the same, such sales or transfers being prohibited by the laws of the United States; and that as plaintiff has no title to the land, and as it is now out of his power to acquire any from the government, the consideration for which defendant's notes were given, has utterly failed. The amended answer concludes with a prayer that the contract between the parties be rescinded, that the notes be cancelled and delivered up to the defendant, and that the plaintiff be decreed to pay him \$1000, for damage suffered in consequence of his failure to make him a good title to the land. There was a judgment below in favor of the plaintiff, from which the defendant has appealed.

The pleadings in this case have been thus minutely set forth, as there is very little evidence in the record, and the suit is to be decided mainly on facts furnished by the pleadings. If the amended answer of the defendant had been the only one before us, we would not hesitate to relieve him on the showing which it makes, and on the evidence adduced in relation to the sale of the land in question to Norris;* but his first answer contains facts and admissions which we cannot disregard, and which he cannot be permitted to gainsay. It informs us that he was originally the vendor of this very tract of land to Clarke, and that the latter sold it to the present plaintiff, with the express understanding that the defendant, Holmes, should have the privilege of repurchasing it at twenty dollars per acre. We must, therefore, consider the reconveyance to him as nothing more than a performance, on the part of the plaintiff, of a stipulation made by himself in his sale to Clarke. His only complaint in his first answer is, that his notes were unfairly obtained by the plaintiff for fifty dollars, instead of twenty dollars per acre, which he says is justly due, and for a greater amount than the plaintiff was entitled to on a settlement of accounts between them. The defendant has not attempted to show any error in this settlement, nor any imposition practiced upon him by

* The land was proved to have been sold to Norris by the United States.

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the plaintiff, but, shifting entirely his grounds of defence, he urges, in his second answer, that there has been a total failure of the consideration for the notes, because the plaintiff had no title to the land at the time he sold or promised to sell it to him, he having bound himself to give him a good and absolute title, and because it is now out of his power to acquire any from the government, whose duly authorized officers have sold it to Thomas L. Norris. This defence cannot be listened to. It is clear that the defendant had a full and perfect knowledge of the situation of the title, under which the plaintiff held the land, and sold it to him; that he knew the danger of eviction when he gave his notes, and that he cannot now resist the payment of the price on that score. Civ. Code, art. 2481.

It is equally clear that the defendant, being himself one of the previous vendors of the land, is bound to warrant and defend the title which passed from him to the plaintiff; that he must be estopped by the exception of warranty, when he prays for a rescission of the sale on the ground of an absence of title in the plaintiff. No satisfactory evidence has been adduced to convince us, that the latter had undertaken to convey to the defendant a more perfect title than that he received from Clarke, defendant's vendee. In relation to this pretended undertaking, the testimony is entirely too vague and inconclusive. It appears moreover, from the defendant's own showing, that his notes were given not only for the price of the land, but in payment of a balance due on a settlement of accounts between himself and the plaintiff, in which that price was included. If Thomas L. Norris has really bought this land *for his own account*, the defendant must blame himself for it, and cannot visit upon the plaintiff his neglect to perfect a title, which he knew was imperfect. For \$200 36, instead of the \$500, which he alleges, but does not prove, that he expended for that purpose, he might have acquired an absolute title.

Judgment affirmed.

JOHN H. KELLAM v. JOHN RIPPEY.

Under the act of Congress regulating pre-emptions, the Register and Receiver of the Land Office in the district in which the lands lie, have, alone, authority to decide upon the claims for pre-emptions; and proof must be made, to their satisfaction, of all the facts necessary to establish the applicant's right to purchase by preference.

The right to claim a pre-emption, conferred by act of Congress, does not give the party entitled thereto, any title in or to the land, until he exhibits the necessary proof, and procures the adjudication of the Register and Receiver of the Land District.

In an action by one claiming land under a patent from the United States, against a party in possession who had made valuable improvements thereon, the latter will be entitled to claim the excess of the value thereof above the fruits received since the commencement of suit.

APPEAL from the District Court of Carroll, *Curry, J.*

BULLARD, J. The plaintiff alleges that he is the owner of a tract of land of one hundred and sixty acres, of which the defendant is in possession, claiming title to the same; and he prays for judgment for the land, and to be quieted in his title and possession. The title which he sets up is a regular patent from the United States.

The defendant, after a general denial, alleges that he took possession of the land in question in 1834, and has continued constantly to occupy it since that period; that he was above the age of twenty-one, was a housekeeper on said land, and in possession on the 22d of February, 1838; and he claims title under the act of Congress of that date, having complied with all the requisites of the act to entitle him to a quarter section. He alleges that the plaintiff's patent was fraudulently obtained under the act of Congress, approved on the 19th of June, 1834, reviving the act of 1830, by means of a pretended float, taken in consequence of a pretended right of pre-emption which Mary Skinner and Randall Golsby claimed to the same quarter section. He avers that they had no pre-emption right. That the float, in virtue of which the plaintiff pretends to derive title, was not located until after the 19th of June, 1836, when the pre-emption law of 1834 had expired. The respondent further alleges that he had made improve-

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ments to the value of four thousand dollars, which he prays may be allowed him in case of eviction.

There was a verdict and judgment for the defendant, and the plaintiff has appealed.

The plaintiff exhibits, as evidence of title, a regular patent for the *locus in quo*, in which it is recited that the land is granted to him as assignee of Skinner and Golsby.

The defendant, on the other hand, has shown no title, nor any regular application to the Register and Receiver to be recognized as a pre-emptioner under the act of Congress of 1838. It is not enough that he shows a settlement and cultivation, when sued by the patentee who has already purchased the land of the United States. The pre-emption laws require that proof should be made of all the facts required by them, to the satisfaction of the Register and Receiver, who are to decide upon the right of the applicant to purchase by preference. The patent bears date Oct. 5, 1838, and the application of Rippey to purchase, and his tender of the price to the Receiver at Ouachita, was not until June, 1839. The record exhibits several *ex parte* affidavits taken in 1841, since the institution of the present action, tending to prove the settlement made by the defendant upon the land, but which do not appear ever to have been laid before the Register and Receiver, who alone have authority to decide upon the claims of pre-emptioners; and the act of 1838, under which the defendant sets up his claim, had expired by its own limitation, before those affidavits were taken. It follows from these facts, that the defendant, having no right under the act of Congress, cannot pretend that any fraud has been practiced upon him; and, even if we could inquire into the validity of a patent on an allegation of fraud, there does not appear to us to be in this case any foundation for such a charge.

This case cannot be distinguished in principle from that of *Henry's Heirs v. Welsh*, 4 La. 547. In that case the plaintiffs had purchased the land under the pre-emption act of 1814, and the defendant showed that he brought himself within the provisions of that of 1830; but his claim had been rejected by the Register and Receiver. The court said: "The last act of Congress may have given to the defendant the right of pre-emption, but this right gives him him no title in the land, nor to the land, until he exhibits the

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necessary proof, and procures the adjudication of the Register and Receiver."

Entertaining this view of the rights of the parties in this case, it appears to us that the plaintiff has exhibited such evidence of title, as to authorize a judgment in his favor for the land. But the defendant has claimed, in reconvention, the value of the improvements which he put upon the premises. So far as those improvements have added to the value of the land, over and above the fruits since the institution of this suit, the defendant, in our opinion, is entitled to be paid by the party evicting him. See *Pearce et al. v. Frantum*, 16 La. 414. But the evidence is insufficient to enable us to fix the amount which he may justly claim, and for this purpose the case must be remanded.

The judgment of the District Court is therefore reversed, and ours is, that the plaintiff recover and be quieted in his title to the tract of land claimed and described in his petition; but it is ordered that the case be remanded to the District Court for the purpose of ascertaining the value of the improvements, and the amount of fruits, or rents and profits, and that, in the mean time, no writ of possession be issued; and that the costs of the appeal be paid by the defendant and appellee.

Sparrow, for the appellant.

Elgee, contra.

JAMES C. DREW v. ELEAZAR T. ATCHISON and others.

Arts. 2080, 2082 of the Civil Code require that all the obligors in a joint contract shall be sued together, including those who may have performed their part, in order that the latter may recover back what they have paid, in case it should be determined they were not bound. The judgment for costs must be *in solido*, against those who have not performed their part.

Where an appeal is taken from a judgment in an action on a joint contract, all who were required to be parties below, must be made parties to the appeal, and this, though a part only have appealed, or the appeal will be dismissed.

THIS was an action before the District Court of Carroll, *Curry*, J., on a promissory note, for \$6000, signed by Atchison, Hall,

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Preston, Whitman, Dorsey, Bosworth, McCullough, and Nubert, payable on the 1st of January, 1839, to the order of one Tompkins, and by him endorsed to the plaintiff. Nubert, having died since the date of the note, his representative answered, denying particularly that the deceased ever signed the note or authorized any one to sign it for him, and, generally, all the allegations in the petition. Whitman, also, answered separately, denying that he ever signed the note. The other defendants answered together, acknowledging their signatures to the note, but denying that they ever delivered it. They aver that having formed an association with three other persons, Browder, Gilmore, and Kerr, for the purpose of purchasing a tract of land from Tompkins, they executed the note sued on for part of the price of the land, on the express condition that it should be signed by the other parties. They allege that the others refused to sign it, and that they are, consequently, discharged; and that Tompkins was unable and failed to make them any title to the land, the purchase of which was the only consideration for which the note was intended to be given.

The case was submitted to a jury, who, having found a verdict in favor of the defendants Nubert and Whitman, and against the others for \$750 each, with interest from judicial demand, a judgment was rendered in accordance therewith. From this judgment, Atchison, Preston, Hall, Dorsey, and Bosworth, prayed for appeals. The last gave no bond; and McCullough did not pray for an appeal. On the appeals taken by Atchison, Preston, Hall and Dorsey, the petition and citations were served on the plaintiff, and on Whitman and Nubert's representative. The record does not show that any citation, or petition of appeal was served on the plaintiff, by Bosworth; though the service was accepted by Whitman and Nubert's representative. In none of the cases was any petition or citation served on McCullough.

Sparrow and McGuire, for the plaintiff. The appeal must be dismissed, the action being on a joint obligation, and all the co-obligors not being before the court. McCullough has not appealed, nor been cited. Bosworth, one of the appellants, has given no bond, nor caused any citation of appeal to be served on the plaintiff.

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Dunlop and *Dunbar*, for the appellants. The contract on which this action is founded, is joint. It was not executed by all the parties, consequently, none are bound. Civ. Code, arts. 2080, 2082. Pothier, Obligations, No. 11. *Villéré et al. v. Brognier*, 3 Mart. 326. *Wells v. Dill*, 1 Mart. N. S. 592. *Row v. Richardson et al.* 4 La. 551.

BULLARD, J. The appellee moves to dismiss this appeal, on the ground that this is a joint action and the judgment joint, and that all the defendants have not appealed, nor been made parties to the appeal.

We think the motion must prevail. In joint contracts the Code requires that all the joint obligors should be sued together, even those who may have paid, in order that they may recover back what they have paid, if it should appear that they were not bound; and no judgment can be obtained against any, unless it be proved that all joined in the obligation, or are by law presumed to have done so. The judgment for costs is *in solido*, against all the defendants who have not paid. Civ. Code, art. 2080, *et seq.*

This court has the authority, and it often becomes its duty to pronounce such judgments as ought, in its opinion, to have been rendered below. In actions upon joint obligations, this becomes impossible, unless all the parties are before us, as they are required to be in the court of the first instance.

*Appeal dismissed.**

* On an application for a re-hearing, the counsel for the appellants, cited the case *Burke v. Erwin's heirs*, 6 La. 320, and *Brander et al. v. Garrett et al.*, 19 Ib. 455. In the last case the court say: "This is an action against Garrett and others, on a promissory note, in the form of a joint obligation." "Garrett is not a party to the appeal; but it becomes necessary to go into his defence, as it appeared, by answers of the plaintiffs, that the whole debt was Garrett's, and that the co-obligors were his sureties," &c. *Re-hearing refused.*

CHRISTOPHER H. DABBS v. JAMES H. STEVENS, Sheriff.

Where the matter really in dispute is under three hundred dollars, and a larger amount is claimed in the petition, evidently for the purpose of giving jurisdiction to the appellate court, the appeal will be dismissed.

APPEAL from the District Court of Ouachita, *Boyce, J.*

Copley, for the appellant.

McGuire, contra.

GARLAND, J. The plaintiff enjoined an execution issued against him for the sum of \$160 65, with interest at ten per cent per annum, from the 1st January, 1840, and costs. The injunction was dissolved with damages, and the plaintiff has appealed.

In this court the appellees have moved to dismiss the appeal, on the ground of want of jurisdiction in this tribunal. The appellant contends that we have jurisdiction, as he claims in his petition \$1000 damages for the tortious act of the sheriff, and also alleges that property to the amount of \$10,000, had been seized under the execution. In support of these allegations, no testimony was offered in the inferior court; nor does it appear that any effort was made to prove any damage, or the value of the property seized.

It is evident that these allegations were inserted for the purpose of giving a nominal jurisdiction to this court. As to attempts of this kind we have fully expressed our opinion in the 16 La. 182, and 17 Ib. 102. We are at all times willing to open this tribunal to every citizen entitled to come before it; but we will not encourage evasions of the constitution, by listening to fictitious demands.

Appeal dismissed.

WILLIAM M. LAMBETH and another v. JAMES D. KERR.

The payee of a note made by the defendant, desiring to secure a debt due to plaintiffs, endorsed the note in blank, and deposited it in the hands of plaintiffs' attorney, to apply a portion of the proceeds, when due, to the payment of the debt; the balance to be accounted for to the endorser. Defendant was notified of the transfer to plaintiffs' attorney for the purposes mentioned, and promised to pay the note to the attorney. In an action against the maker: *Held*, that the endorsement and delivery of the note for the purposes stated, and the notice to defendant, operated a legal transfer of the portion intended to be paid to the plaintiffs; that defendant's promise established his consent to the division of the debt; that claims against the payee, subsequently acquired by defendant, can only be set off against the portion of the note not transferred for plaintiffs' benefit; and that the attorney became the agent of both the plaintiffs and payee, and was accountable to each for the portions respectively due to them.

APPEAL from the District Court of Carroll, *Curry, J.*

Willson and Brent, for the appellants.

Dunlap, contra.

MORPHY, J. This is a suit brought by the holders against the maker of a promissory note, for \$4000, drawn to the order of and endorsed by James B. Prescott, dated the 7th of April, 1840, and payable on the 15th of February, 1842, from which date it bears interest at the rate of ten per cent per annum on its face. The defendant admits his signature to the note, but shows that J. B. Prescott, the payee, is indebted to him in the sum of \$5875, by reason of sundry documents annexed to his answer, establishing payments to that amount, made by him for Prescott on the 10th of March, 1842. He further alleges that Prescott, being thus indebted to him, for the purpose of defrauding him, sold the note to the plaintiffs, who received it after maturity, well knowing the indebtedness of the payee to him. He pleads compensation and payment, and prays that the note sued on may be cancelled and delivered up to him, and that its amount be credited on the claims he has against Prescott. There was a judgment below in favor of the defendant, and the plaintiffs have appealed.

The record shows that in June, 1840, J. B. Prescott, a debtor of plaintiffs, being at the office of J. N. T. Richardson, their attorney at law, made his note in their favor for \$3015, due one day

after date, and bearing interest at ten per cent per annum ; that he delivered the note to Richardson, as a mutual friend of his and the plaintiffs, for safe keeping ; that, at the same time, he endorsed the note sued on in blank, and handed it to Richardson to be collected of the defendant at maturity ; that the note sued on was left as collateral security by Prescott to ensure the payment of the debt of \$3015, and with the express understanding and agreement that, out of its proceeds when collected, Richardson was to pay the note of \$3015 to the plaintiffs, who were apprized of this arrangement ; that about the 1st of April, 1841, Robert Garland called upon Richardson in the name of the plaintiffs, and demanded the note sued on, together with the note of \$3015 drawn by Prescott in their favor ; that Richardson declined giving up the notes, stating as his reason, that the note sued on exceeded the other in amount by several hundred dollars, for which he was accountable to Prescott, and because he considered himself under a pledge to the latter not to deliver the note of \$3015 to be sued on, but to pay it when the note of \$4000 should be collected at maturity. It appears, further, that upon the refusal of Richardson to surrender the note, Robert Garland gave notice to the defendant, that Lambeth and Thompson were the true and legal holders and proprietors of the note, and that he should not pay it to any person but them. Richardson testifies that he had frequent conversations with the defendant, between June, 1840, and the maturity of the note, in which he informed him of the terms and conditions upon which he held his (defendant's) note, and that defendant promised several times to pay him the amount of the note, not many weeks prior to its maturity ; and that since his return from New Orleans the defendant told him that he would have paid him the note, had he (witness) arrived at New Orleans earlier in February last, and that witness could then have paid over the amount to plaintiffs. He further declares that, since February, 1842, he delivered to J. B. Prescott his note of \$3015, and delivered to R. Garland the note of \$4000, he and J. M. Chilton, acting as the agents and attorneys of the plaintiffs, and binding themselves to account to him for the benefit of Prescott, for the difference between the amounts of the notes, the difference being about four hundred and ninety dollars ; that Garland had an order from the plaintiffs on him for

the note of \$4000, and that Prescott also produced an order from the plaintiffs for his note of \$3015, and that both orders were dated the 11th of March, 1842. Richardson adds, that he should have refused to surrender the note sued on to the plaintiffs, or to any other person, until the debt of \$3015 was settled by Prescott. Another witness, John L. Wilson, deposes that in a conversation which he had with the defendant some time during the winter of 1841-2, he told him that he had to raise about \$4000 to pay one of Prescott's notes to Major Richardson, who held it as agent of Lambeth and Thompson.

It is clear that the endorsement and delivery of the note sued on by Prescott to Richardson, before maturity, vested in the latter such a legal title as gave him the right to sue on it in his own name, but left it liable to all the equities of the maker against the endorser, Prescott, had he remained the sole owner of the note, and not disposed of any part of it. But it clearly results from the whole testimony, taken together, that, from the moment the note was placed in the hands of the plaintiffs' attorney, Prescott retained only a right to the balance that might remain after paying his debt of \$3015, and that, had he changed his mind, he could not have regained possession of this note without first paying the debt. Richardson declares, unequivocally, that he would not have returned the note to Prescott, without a settlement of the note of \$3015 in favor of the plaintiffs. The order to pay this sum out of the proceeds of the note when collected, and the endorsement and delivery of it by the payee for that purpose, coupled with the notice of this order or appropriation given to the maker, operated, we think, a legal transfer or assignment of that portion of the note. Richardson became the agent of both the owners of the note, and was accountable to each for his proportion of its proceeds. Of this arrangement the defendant not only had notice both from Garland and Richardson, but he acquiesced in it by repeatedly promising that he would pay the note in the hands of Richardson, who, he knew, was to execute the agreement between the payee and the plaintiffs. But it is objected that a debt, as between the debtor and creditor, is indivisible without the consent of both, and that, therefore, no partial transfer can be made by a creditor, so as to be binding on a debtor, except with the consent of the latter.

Scarborough v. Stevens. Sheriff, and others.

This we readily admit. But in this case, such consent is, we think, sufficiently shown, by the repeated promises of the defendant to pay the note to Richardson, the plaintiffs' agent, when he had a full knowledge of the transfer or assignment of a portion of it to them to pay a debt of the payee. He can, therefore, set off the credit he subsequently acquired against Prescott, only against that portion of his note which belonged to the latter on the 10th of March, 1842, when the two debts co-existed. Civ. Code, arts. 2203, 2204. Adding to the debt due to the plaintiffs, interest at the rate of ten per cent per annum up to that time, we find that they were then entitled to \$3542 of the proceeds of the note placed in the hands of their agent; and, for this amount, we think they, are, in law and equity, entitled to a judgment.

It is, therefore, ordered, that the judgment of the District Court be reversed; and that the plaintiffs recover of the defendant the sum of three thousand five hundred and forty-two dollars, with interest at the rate of ten per cent per annum, from the 25th of March, 1842, until paid, with costs in both courts; reserving to the defendant the right of off-setting the balance of this note, against any claims he may have against the payee, J. B. Prescott.

THOMAS C. SCARBOROUGH v. JAMES H. STEVENS, Sheriff, and others.

2r	147
125	921

No particular form is prescribed by law for a warrant or execution, on behalf of the State, against a delinquent tax collector. A writ signed by the Treasurer, commanding the proper officer, "in the name of the State of Louisiana," is a sufficient compliance with the provision of sect. 6, art. 4, of the State constitution, in regard to the style of process.

The second section of the act of 20th March, 1816, requires that the property of a delinquent sheriff, which has been seized under execution issued by the Treasurer of the State, shall be sold for cash, and without appraisement.

Where a sheriff has received a tax roll and undertaken its collection, he must show that he has used due diligence. He cannot throw upon the State, the burden of proving that he actually received the amount.

Defendant, a sheriff, having received the tax roll, and given security for its collection, enjoined an execution issued against him by the Treasurer for the amount, on the ground that he had no legal authority to collect, no assessors having been appointed,

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nor assessment regularly made There was no allegation or proof of any difficulty in making the collections in consequence of such pretended irregularity, nor any proof that defendant hesitated, on that account, to proceed with the collection. On a motion to dissolve the injunction : *Held*, that such illegality not having been objected by the tax payers, it is too late for the sheriff to interpose such an objection.

The law having provided the mode by which a sheriff, who has undertaken to collect the taxes, can obtain a credit for the amounts due from non-residents or insolvents, he will not be allowed, by enjoining an execution issued against him by the Treasurer, to retain such amounts. He must resort to the means pointed out by law, to establish the credit to which he is entitled.

Under the twenty-first sect. of the act of 27th March, 1813, a sheriff who fails to pay over, according to law, the taxes collected by him, will be entitled to no commission for their collection.

The twenty-first sect. of the act of 22d February, 1817, which allows the prosecuting attorneys on behalf of the State, ten per cent on amounts collected by them, to be paid by the defendant, will not authorize the allowance of such a commission to a District Attorney, who appears on behalf of the officers of the State, for the purpose of dissolving an injunction, obtained by a delinquent sheriff to stay an execution issued against him by the Treasurer. The defence of such a suit, is one of the duties that devolves on the District Attorney as a public officer.

APPEAL from the District Court of Ouachita, *Boyce, J.*

Garrett, for the appellant.

McGuire, District Attorney, contra.

GARLAND, J. The Treasurer of the State in the month of May, 1841, in conformity with two acts of the legislature, (Bullard & Curry's Dig. p. 718, sec. 2, No. 61,—p. 800, sec. 2,) issued an execution against Scarborough, the former sheriff of Ouachita, directing the present sheriff, the defendant, to seize his property and sell it, for the purpose of paying the State taxes for the year 1838, which he had collected and not paid into the Treasury. Under this writ, the sheriff made a seizure, and advertised certain property for sale. The plaintiff presented his petition for an injunction, which was allowed, on his alleging the following grounds :

First. That the execution is not in the name of the State of Louisiana.

Second. That he is entitled to all the legal delays and privileges granted to other debtors, when their property is seized, viz : the legal delay between seizure and advertisement, the right of appraisement, and sale on twelve months' credit, if the property will

Scarborough v. Stevens, Sheriff, and others.

not sell for two-thirds of the appraised value, which privileges have been denied him.

Third. That he is not liable for the taxes for the year 1838, as no legal assessment roll was made for that year. That the assessors were not legally appointed, nor were there a sufficient number in office, in consequence whereof, he had no legal authority to enforce the payment of taxes.

Fourth. That he cannot, in any event, be held responsible for the sum of \$560 66, as the pretended tax roll included persons who had become citizens of the parishes of Caldwell and Union, in accordance with subsequent acts of the legislature establishing those parishes, and the collection of the taxes in those parishes, amounting to \$560 66, being provided for, by special laws.

Fifth. That he is not responsible for the sum of \$518 60, it being the amount of taxes on said pretended roll, owing by non-residents and insolvents, which he could not have collected though he had had legal authority.

Sixth. That no commissions are allowed for collecting the State taxes.

The District Attorney of the Seventh District, answered on behalf of the State, that there is no error in the process issued by the Treasurer ; that the complainant is not entitled to any delay, nor to the benefit of having his property appraised ; that he cannot allege any illegality in the tax roll, as he gave his receipt for the same, and bond faithfully to collect and account therefor, and does not pretend that any obstacle was interposed to prevent the collection of the taxes ; and that he has not made out and returned a list of non-residents and insolvents according to law. That there is an error in the amount, which he states that he could not collect in the parishes of Caldwell and Union ; that he is not entitled to a credit for the taxes of non-residents and insolvents ; that as he has not proceeded according to law, he is not entitled to any commissions for collecting the taxes, and is bound to pay interest at ten per cent per annum, from the 1st June, 1839, on the taxes, and ten per cent to the District Attorney on the whole sum recovered. He prays for these allowances ; for a dissolution of the injunction ; and for a judgment against the complainant and his sureties in

the injunction bond, *in solido*, for these sums, and twenty per cent special damages.

The judgment allows the complainant a credit of \$516 31, for the taxes of the parishes of Union and Caldwell. It refuses to allow the deduction of \$518 60, for non-residents and insolvents, but reserves his rights to a credit, on the facts being shown in the manner required by law. It orders the payment of interest at ten per cent, from May 31st, 1839; and dissolves the injunction, except as to the sum credited as before stated. From this judgment the plaintiff has appealed.

The District Attorney prays for an amendment of the judgment, so as to allow him ten per cent on the amount enjoined, to be paid by the defendant; and the plaintiff asks for a reversal, and perpetuation of the injunction, on the grounds before stated.

As to the first ground assumed, we think the execution is in the name of the State. It begins by an address from the Treasurer to the sheriff, and a recital that the plaintiff has not paid the taxes of the year 1833, and then proceeds: "You are hereby required in the name of the State of Louisiana, to collect," &c. and if the money is not paid on demand, to seize and sell, &c. The law prescribes no particular form for a warrant or execution of this kind, and we think the one before us sufficient. The authority cited from 3 Mart. 719, sustains the view we take of the case.

The second ground taken by the complainant, is not sustained by law. The statute expressly directs a seizure and sale of the property of a defaulting sheriff, without appraisal, or any delay, but that necessary to advertise the usual number of days. Bullard & Carry's Dig. p. 718, sec. 2, No. 61.

On the third ground, it is proper to state that there is no allegation in the petition, that the sheriff was in any manner obstructed, or impeded by any person, in collecting the taxes, in consequence of any irregularity in making the tax roll or in the election of assessors; nor has any attempt been made to prove it, or to show that the complainant hesitated, on that account, to proceed in the collection of the taxes. He received the assessment roll from the Parish Judge, and gave his receipt for it, and a bond with security to collect and faithfully to account for and pay over the taxes to the Treasurer, without any objection; and it is too late now, to in-

terpose objections as to the alleged illegality of the election of assessors and other matters, when it does not appear, that any such objections were ever made to him by the tax payers. When a sheriff receives a tax roll and undertakes to collect the taxes, he must show that he has used due diligence ; and he cannot throw the burden upon the State, of proving that he actually received the money. 8 Mart. N. S. 328. 17 La. 345.

The fourth objection urged, has been in effect sustained, and the judgment allows a credit for all that is proved.

We think the District Judge did not err, in refusing to allow the complainant a credit for the amount he claims for taxes, alleged to be owing by non-residents and insolvents. The law directs the mode which a sheriff must adopt to obtain such credits, and it cannot be permitted to a sheriff or tax collector, to withhold the public money and refuse to pay it into the Treasury, on the ground that he has not been allowed credit for the taxes of non-residents and insolvents, when he has neglected the legal means of showing the amount of such credits, and has never asked at the Treasury to have them allowed. It will be time enough for the plaintiff to complain of the disallowance of his alleged off-sets, when he shows that they have been refused ; and the reservation made in the judgment, leaves him ample remedy to have any injustice corrected.

The complaint that no commissions for collecting the taxes is allowed by the Treasurer, comes with a bad grace from the party who denies all responsibility, and keeps the public money in his pocket. The legislature has, with great propriety, provided that no defaulter shall receive any compensation for the collection he may make ; and has, moreover, declared, that he shall pay interest at the rate of ten per cent per annum on all sums withheld. B. & C. Dig. p. 706, sec. 21. The judge, therefore, did nor err, in condemning the complainant to pay interest at the rate specified, from the time mentioned, until paid, and in withholding any allowance for commissions for collecting.

As to the prayer for an amendment of the judgment, so as to allow the District Attorney ten per cent on the amount collected, to be paid by the defendant, we do not think it ought to be made. The twenty-first section of the act of 1817, in relation to the public revenue, (B. & C. Dig. p. 719,) does not apply to a case like

the present. The defence of a suit like this, is one of the duties that devolves on a District Attorney, as a public officer, and the legal defender of the rights of the State, for which he is compensated by his regular salary. If any money be collected by the District Attorney, he will probably be entitled to a commission on other grounds ; but he has no right to claim anything from the plaintiff.

Judgment affirmed.

FLEMING NOBLE v. JESSE NETTLES.

Under art. 647 of the Code of Practice, the undivided share of an heir in a succession, may be seized and sold under execution.

It is not necessary that it should be shown that any attempt has been made to seize moveables, immoveables, or slaves, before seizing the rights and credits of the debtor. The property must be pointed out by the latter, or, under art. 649 of the Code of Practice, by allowing the sheriff to execute the writ, without exercising his right of pointing out the property to be seized, he will lose it.

In an action, by the purchaser, at a sale under execution, of the undivided shares of certain heirs in a succession, against the administrator, for paying over the amount to the heirs after notice, the defendant cannot set up any irregularity or nullity in the original proceeding against the heirs ; the payment is at his peril, and he will be liable over to the purchaser.

ONE Brooks, having obtained a judgment against Abraham Marler, seized under execution certain property of the latter, which was sold on a credit of twelve months, and purchased by Marler himself, for the price of which he executed a bond, with Meredith Marler as his security. The bond not being paid at maturity, an execution was issued against both the obligors, and under it the sheriff seized their undivided shares in the succession of their father. The plaintiff became the purchaser of these shares, under a sale by the sheriff. Nettles, the administrator of the succession, having paid the amount of the shares to the two heirs, after notice of plaintiff's purchase, the latter instituted the present suit before the District Court of Caldwell, to render him liable for the amount. From a decision of *Boyce, J.* in favor of the defendant, the plaintiff has appealed.

McGuire, for the appellant. The judgment should be reversed, and one rendered in favor of the plaintiff.

Garrett, for the defendant. It has not been shown that the twelve months' bond was legally taken. The seizure was illegal; rights and credits can only be seized after the moveables, immoveables, and slaves of the debtor. The rights seized are not described with sufficient certainty. The interests of Abraham and Meredith Marler, in the succession of their father, should have been sold separately, not together.

BULLARD, J. The plaintiff alleges, that he purchased at a sheriff's sale, the undivided interest, or hereditary portion of two of the heirs of James Marler, deceased; that the defendant, Nettles, was the administrator of the estate, and, with a full knowledge of the plaintiff's purchase, paid over to those heirs their portions, which were liquidated, on a final partition among the heirs, at \$240 10 each, whereby he became liable to pay him the amount, thus wrongfully paid over after notice.

The defendant first answers by a general denial; he avers that he has paid to each of the heirs his share, according to the order of the court; that he has nothing in his hands, and that the plaintiff has no right of action against him. He prays that Meredith and Abraham Marler, the two heirs in question, may be cited in warranty. This prayer was disregarded, but no complaint is made on that account. There was a judgment for the defendant, and the plaintiff has appealed.

The argument, in this court, has turned principally upon the question, whether the undivided share of an heir in a succession, can be sold, according to the existing law. The Code of 1808, under the title of Seizure and Sale, prohibited it. That title was wholly omitted in the Code of 1825, and it was ruled by this court that it still remained in force. But the act of 1828, repealing certain articles of the former Civil Code, declares, "that all the articles contained in the old Civil Code of this State, &c., and all the provisions of the same which are not reprinted in the new Civil Code of Louisiana, published under the authority of this State, &c., shall be, and the same are hereby repealed, except so much of title tenth as is embraced in its third chapter, which treats of the Dissolution of Communities or Corporations."

1 Bullard and Curry's Digest, 151. 5 Mart. N. S. 702. 6 Ib. 90. 3 La. 150.

The Code of Practice authorizes the seizure of rights and credits, and sums of money due in whatsoever right, except for alimony or salaries of office. Art. 647.

It is urged, however, by the counsel for the defendant, that the seizure was illegal, inasmuch as rights and credits cannot be seized until after moveables, slaves, and immoveables, and that it is not shown that any attempt was made to seize other property. To this, it appears to us a sufficient answer to say, that whatever right the defendant in execution has to point out property, is lost if he allows the sheriff to execute the writ without exercising the right. Code Prac. art. 649.

It is further said, that the plaintiff has failed to show that the twelve months' bond, under which his execution was issued, was taken legally. This, we think, he was not bound to show in the present case, and that the defendant has no capacity to set up such a nullity, or others upon which he relies in his argument, such as the vague description of the right sold.

The record shows that the shares of the two heirs were sold, and purchased by the plaintiff; that the defendant, who was at that time administrator of the father's estate, proceeded to liquidate it, and paid over to the heirs their respective portions, notwithstanding his knowledge of the plaintiff's purchase. This, we think, he did at his peril, especially as it appears to have been done voluntarily, and not within the scope of his duties as administrator.

The judgment of the District Court is, therefore, reversed, and it is ordered, that the plaintiff recover of the defendant, four hundred and eighty dollars and twenty cents, with interest at five per cent from judicial demand, and the costs in both courts.

Hemken v. Farmer.

BERNARD HEMKEN v. WILLIAM W. FARMER.

3r	155
123	865

It is not necessary that a citation should contain the name of the judge of the court from which it is issued. Art. 179 of the Code of Practice enumerates all the requisites of a citation.

Where the record shows that the defendant moved to have a judgment by default set aside, he will not be permitted to urge before the appellate court, that no such judgment was obtained.

It is not required that the grounds upon which a judgment by default was taken, should be stated in the record. The absence of any exception, or answer, is, itself, evident and sufficient ground.

Where the record contains the evidence on which a judgment by default was made final, it is unnecessary that it should state that it was taken down at the request of either party.

APPEAL from the District Court of Union, *Willson*, J.

McGuire, for the plaintiff.

Copley, for the appellant.

MARTIN, J. The defendant and appellant has placed this suit before us, on a bill of exceptions and an assignment of errors. The defendant moved for a dismissal of the suit, and on the refusal of the judge below took a bill of exceptions. The bill states: *First*. That the copy of the citation served on him did not contain the name of the judge of the court, from which it was issued. *Second*. That it was not a true copy of the original citation.

In the copy of the citation the name of the judge was not written at full length, although it was so in the original, *E. H. Wilson* being written in the latter, and *E. H. Will* in the former. It does not appear to us that the judge erred. The Code of Practice, art. 179, contains an enumeration of all that is required to constitute a legal citation, and no mention is made therein of the necessity of its containing the name of the judge of the court from which it is issued. As this name, therefore, need not have been inserted in the original citation, the omission, or mis-spelling of it in the copy, ought not to be fatal.

The errors assigned are: *First*, That it does not appear that any judgment by default was taken, nor, if taken, on what day. *Second*, That it does not appear that three judicial days elapsed between such judgment and the time of its being made final.

Wells v. Moore and another, Executors.

Third, That the ground on which a judgment by default was taken is not stated, nor the evidence upon which it was made final. The defendant having moved that the judgment by default taken against him should be set aside, on the ground that the citation to him was not in due form, cannot be listened to when he urges that no judgment by default was taken.

The law does not require that the grounds upon which a judgment by default was taken, should be stated in the record. The absence of any exception or answer in the record, is itself a sufficient and evident ground for such a judgment. The record contains the evidence on which the judgment by default was made final; but the defendant and appellant's counsel urges, that as the record does not state that the evidence was taken down at the request of either party, it must be considered as if it had not been taken down. This is certainly a *non sequitur*.

Judgment affirmed.

MONTFORT WELLS v. THOMAS O. MOORE and another, Executors.

The purchaser of property sold under a *fi. fa.* on twelve months' credit, having offered defendants' testator to the sheriff as security for the price, received a blank bond from the sheriff to be signed by himself and the testator, and filled up on its return. The bond was signed, but not returned to the sheriff, till after the death of the surety, which happened a few days after he signed the instrument, when it was filled up. *Held*, that the security having been previously approved by the sheriff, the contract was complete by the signature of the former.

In a sale under execution, on a twelve months' credit, the sheriff is the agent of the party for whose benefit the sale is made, in taking bond from a purchaser. He is liable to the former if he accept insufficient, and to the latter if he refuse sufficient surety; and is, therefore, the proper judge of its sufficiency.

ACTION against the executors of Richard Winn, before the Court of Probates of Rapides, on two bonds executed by one Hale, and Winn, as his security, for the price of property sold, at twelve months' credit, under a *fi. fa.* in favor of the plaintiff. General denial, and allegation that the bonds were filled up after the death of Winn, and are, consequently, void.

On the trial, Winn's signature, and his death on the 5th

October, 1840, were admitted. Crumpton, deputy sheriff, testified that he handed the bonds to Hale, previously to Winn's death; that the dates and amounts were, perhaps, filled up, leaving some blanks; that they were brought to him, after Winn's death, signed by the latter, when the remaining blanks were filled up. He stated that he was in the habit of handing such bonds to parties, with only the dates and amounts filled up, to be executed by them, and subsequently completed on their return to him. It was his habit to fill up the date, the title of the suit, the amount, and rate of interest, when he delivered the bonds for execution, and to fill up the remaining blanks on their return. He could not state, with certainty, what had been done in the case of the bonds sued on. He added, that when "these bonds were returned to the office he was under the impression that they were not good, in consequence of not having been accepted before Winn's death; but after conversation with some one, he does not recollect who, he determined to take them." The witness further stated, "that it was the understanding, when the bonds were given to Hale, that he was to get Winn as the security, and that he told Hale, that he would be satisfied with him as such."

Hale, the principal obligor, stated, that when the bonds were signed by Winn, they were blank as to date, title of suit, amount, rate of interest, and description of property; that they were returned by him to the sheriff's office, some time after Winn's death; that he does not recollect having offered Winn as security, when the bonds were handed to him for execution; that they were not accepted by the sheriff until after Winn's death; that the sheriff objected to accepting them on account of his death; and that they were taken by the officer, and filled up after consultation. He stated, further, that he explained to Winn the nature of the debts for which the bonds were given; and told him, as nearly as he could, the amounts in which they were to be filled up. He proved that they were signed by Winn a few days before his death, which occurred after a sickness of six or seven days; and that they "were filled up in pursuance of the conversation between himself and the deceased."

There was a judgment, *Waters, J.*, in favor of the plaintiff, from which the executors have appealed.

Elgee, for the plaintiff, asked for a confirmation of the judgment.

Brent and *O. N. Ogden*, for the appellants. The contracts were not complete at the time of Winn's death, by the acceptance of him as security. His signature to the blank bonds, was, at most, a power of attorney to Hale, or the sheriff, to fill up the bonds, which was vacated by his death. Civ. Code, art. 2996.

MARTIN, J. The defendants are appellants from a judgment against the estate of their testator, Richard Winn, on two twelve months' bonds executed by him as surety, but retained by his principal until after his, the testator's, death; and their counsel contend, that there is no evidence that he bound himself, nor that the bonds were accepted by the sheriff. The record shows that, after the sale, the principal named to the sheriff the defendant's testator as his surety; that the sheriff then gave him two blank bonds partially filled up, in order that they might be executed by both the principal and surety, which was accordingly done. It is urged that judgment was correctly given against the estate, Winn having been accepted as surety by the sheriff, and having afterwards bound himself, by his signature, to the bonds.

It is objected, that there was no acceptance of the bonds, and, therefore, no completion of the contract of suretyship, during the life of the testator; and that the delivery of the blank bonds, partially filled up by the sheriff, was not an acceptance of the surety, who ought to have been accepted, not by the sheriff, but by the plaintiff in the execution; that the sheriff, when the bonds were handed to him after the testator's death, at first refused to receive, but afterwards took them.

It appears to us that the court did not err. The acceptance of the surety must precede his execution of the bond, for it would be in vain to execute it before the surety was approved. The refusal of the sheriff, at first, to take the bonds, when they were presented to him after the surety's death, cannot be considered by the court as a circumstance destroying the evidence of his acceptance of the surety resulting from his having handed to the principal blank bonds, partially filled up, to be executed by the testator; and his retaining the bonds afterwards, and filling them up, destroys the presumption which is attempted to be drawn from his refusal at first. The sheriff is the agent of the plaintiff

Bordelon v. Kilpatrick.

in the execution, in taking the defendant's bond, and is liable to the former if he accepts an insufficient surety, and to the latter if he refuses a solvent one ; he is, therefore, the proper judge of the sufficiency of the surety, and, consequently, the person who is to exercise his judgment on the acceptance of the bond.

Judgment affirmed.

LOUIS BORDELON v. ANDREW C. KILPATRICK.

One who purchases a note, knowing that the payment will be contested, will hold it subject to any defence to which it would have been subject in the hands of the payee.

On a question of fact, the judgment of the lower court will be affirmed, unless manifestly erroneous.

APPEAL from the District Court of Rapides, King, J.
Brent, for the plaintiff.
Ryan, for the appellant.

MARTIN, J. The defendant resists the claim of the plaintiff, as endorsee of his promissory note, on the ground of the absence or failure of consideration. There was judgment against him, and he has appealed. The record shows, that the note was given by the defendant to Metts, for the price of a tract of land in the Republic of Texas, on the 1st day of May, 1839, payable on the first of January following. That, on the 8th of May, 1839, the defendant published advertisements into two papers printed in the town of Alexandria, announcing that the note had been obtained from him through imposition and fraud, forewarning all persons from trading therefor, and announcing his determination not to pay it unless compelled by law. One witness deposed, that the note was, as he believes, acquired by the plaintiff sometime in the month of June following. The note was for \$600, and the plaintiff paid the payee \$500 therefor, one-half in cash, and the balance a few days after.

The plaintiff resided in Marksville, Avoyelles, which is distant from Alexandria about thirty miles. The Alexandria papers were

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published weekly, and he was a subscriber to one of them. There is some evidence of the defendant having been imposed upon by the payee of the note. The counsel for the defendant has urged that the court erred. The sum paid by the plaintiff for the note, his being a subscriber to one of the papers in which it was advertised, and his trading for it several weeks after the publication of the advertisement, are circumstances which raise a very violent presumption that he knew that he was acquiring a note, the payment of which would be contested; consequently, though the note was transferred to him before maturity, the maker may well oppose to him the grounds on which he would be entitled to relief in a suit by the payee. As those grounds were known to him, they must be available against him.

The counsel for the plaintiff has, on the other hand, contended, that he is in possession of the judgment of the inferior judge on a mere question of fact, and that the evidence on the principal question, to wit, the regularity of the mail between Alexandria and Marksville, is greatly contradictory. In such cases this court is in the habit of affirming the judgment of the judge *a quo*, unless the evidence greatly preponderate against him.

Judgment affirmed.

3r	100
111	738
3r	100
125	164

BENJAMIN LEE v. JAMES DARRAMON, and another.

The provisions of arts. 697 and 698 of the Code of Practice, requiring the sheriff to cause the act of sale executed by him for property sold under a *fi. fa.*, to be recorded in the office of the clerk of the court from which the writ was issued, were designed to give to the sheriff's deed the authenticity of a notarial act, and to authorize its introduction in evidence without further proof of its execution. They do not repeal, nor in any way modify the act of the 24th March, 1810, which declares, sect. 7, that no notarial act concerning immoveable property shall have effect against third persons, until recorded in the office of the parish judge of the parish in which it is situated; nor that of 26th March, 1813, providing, sect. 1, that sales of land or slaves, under execution, shall, except between the parties, be void, unless so recorded.

The act of 20th March, 1827, establishing the office of Register of Conveyances for the city and parish of New Orleans, was intended only to create a particular office, for that city and parish, in which all transfers of immoveable property should be

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recorded, which, in other parishes, were required to be recorded in the office of the parish judge.

Where the sheriff's deed for immoveable property sold under a *fi fa.*, subject to a previous mortgage, has not been recorded in the office of the parish judge of the parish in which the property is situated, it will be without effect as to the hypothecary creditor, who may seize and sell the same as if in possession of the original debtor.

APPEAL from the District Court of Madison, *Curry, J.*

Bemiss, for the appellant.

F. H. Farrar, for the defendants.

MORPHY, J. The plaintiff is appellant from a judgment dissolving an injunction he had obtained to stay the execution of two writs of seizure and sale, issued at the instance of the defendants, as judgment creditors of one Nicholson Barnes. These writs were levied on property in the parish of Madison, which had been specially mortgaged by Barnes to secure the payment of two promissory notes, on which the defendants' judgments were rendered. The principal ground relied on by the plaintiff in injunction, is, that he had purchased the premises seized, together with other property, on the 19th of April, 1841, at a sheriff's sale, made in virtue of previous executions against Barnes, and that being a purchaser and third possessor of the land mortgaged to the defendants, the latter should have resorted to an hypothecary action, as required by article 709 of the Code of Practice, and could not seize it in their hands, as if yet belonging to their debtor. To this, the appellees have answered, that they were not obliged to treat him as a third possessor, because they were without any legal notice of the sheriff's sale, which has never been recorded in the parish judge's office, and that without such registry it can have no force and effect as to third persons. The record shows that the sheriff's sale to Benjamin Lee, has not been recorded in the office of the parish judge of Madison; and it is admitted, that since the sale, both Barnes and Lee have lived upon and possessed the premises.

The act of the 26th of March, 1813, (B. & C.'s Dig. p. 596,) provides, sect. 1, "that all sales of lands or slaves made by any sheriff, or other officer, by virtue of any execution," &c., shall be recorded in the parish where the land is situated, otherwise they shall be "utterly null and void, to all intents and purposes, except

between the parties thereto." The act of the 24th of March, 1810, (sect. 7, same Dig. p. 596,) provides, "that no notarial act concerning immoveable property shall have any effect against third persons, until the same shall have been recorded in the office of the judge of the parish where such immoveable property is situated." We understand that the law of 1827, creating a Register of Conveyances for New Orleans, has only established for that city and parish a particular office, where all transfers of immoveable property or slaves are to be recorded, in the same manner as, in the other parishes of the State, the registry is under the above quoted laws, to be made in the offices of the parish judges. Under these provisions of law this court has held, that, without such registry, alienations of immoveable property are not binding against third persons. 11 La. 342, 490. 15 Ib. 269. But it has been strenuously urged by the appellant's counsel, that, so far as sheriffs' sales are concerned, a change in the law on this subject has been made by articles 697 and 698 of the Code of Practice; and we have been referred to a decision in the 10 La. 522, which, it is said has so construed them. On examining that case, we find that the court have only decided, that the registry in the clerk's office gives to the sheriff's deed all the authenticity of a notarial act, and authorizes its being read in evidence without further proof of its execution. Such we still believe to be the whole meaning and effect of these articles of the Code. We cannot consider them as repealing, or modifying in any way the acts above quoted, on the subject of the recording required to be made in the offices of the parish judges. We are confirmed in this opinion by a subsequent law, passed on the 25th of March, 1828, which provides that in case of the loss of the original of a sheriff's sale, a copy from the clerk's office shall be admitted to record in the parish judge's office, and shall have the same effect, in every respect, from the time the same was recorded, as if the original itself had been recorded. We are, therefore, of opinion, that the defendants had the right of seizing and selling the land mortgaged to them, as if no sale had taken place, and that the injunction was properly dissolved. This view of the subject renders it unnecessary to notice the several other matters presented by the record.

Judgment affirmed.

Brien v. Loftus and another.

JOHN SMITH BRIEN v. RALPH LOFTUS and another.

Defendants having obtained a judgment against plaintiff in a Circuit Court in another State, procured an order of seizure and sale in this. Subsequently to the order of seizure, plaintiff obtained an injunction from the Chancellor of the State in which the original judgment was rendered, staying its execution until the further order of court. On an application to enjoin the order of seizure and sale: *Held*, that the injunction should be maintained until the termination of the chancery proceedings on the original judgment.

APPEAL from the District Court of Madison, *Curry, J.*

T. N. Peirce, for the appellant.

Stacy, for the defendants.

MARTIN, J. Loftus and Whitehead, having obtained a judgment against Brien and Young, in one of the Circuit Courts of the State of Mississippi, procured an order of seizure and sale from the judge of the Ninth District of this State, who, on the application of Brien, granted an injunction to stay the sale. The defendants are appellants from a judgment dissolving the injunction. The injunction was obtained on a petition sworn to by Brien, alleging, among other grounds on which he sought relief, that the execution of the judgment obtained in the State of Mississippi was there enjoined, the plaintiff having appealed to the Court of Chancery of that State for relief against the judgment. The defendants, in their answer to the petition for the injunction, pleaded the general issue, but did not expressly deny that the plaintiff had obtained an injunction from the Court of Chancery of the State of Mississippi, staying all proceedings on the judgment of the Circuit Court of that State, on which the order of seizure and sale, granted by the judge of the Ninth District, had been issued. They aver, on the contrary, that the injunction obtained from the Court of Chancery was sued out wrongfully, and with the intention of depriving the defendants of the benefit of the judgment rendered in their favor by the Circuit Court.

The counsel for the defendants has urged, that the injunction granted by the Court of Chancery of the State of Mississippi, being posterior to the order of seizure and sale obtained in this State at a time when the defendants had an absolute right thereto,

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cannot arrest the action of a court of this State in their favor, in an action properly instituted.* The court, in our opinion, erred. The judgment on which the order of seizure and sale was issued, cannot now be carried into execution by the court which rendered it, until the proceedings in the Court of Chancery in the State of Mississippi terminate in favor of the original plaintiffs, nor can it be now ordered to be executed by us. Should the plaintiff obtain relief in the Court of Chancery, he ought to be protected in this State.

It is, therefore, ordered, that the judgment be reversed; that the injunction be reinstated, and provisionally maintained until the termination of the suit in the Court of Chancery of the State of Mississippi.

STEPHEN DUNCAN V. EDWARD SPARROW.

The act of thirteenth of March, 1827, relative to the protest and notices to drawers and endorsers of bills and notes, does not change the general commercial law, as to the diligence to be used in serving notices of protest; it merely provides a new mode of proof of such diligence, by authorizing the notary, or other officer, to state in his protest, the manner in which the demand was made of the drawer, acceptor, or person by whom such order or bill was drawn or given, and, in a certificate subjoined thereto, the manner in which the notices were served or forwarded, and by making a certified copy of such protest and certificate evidence of all the matters therein stated. The provisions of this act being in derogation of the general commercial law, the mode of proof which it authorizes will be received as sufficient evidence of notice, only, where the formalities it prescribes have been strictly complied with.

Where the party to whom notice is to be given does not reside in the town where the protest was made, the second section of the act of 1827, requires: *first*, that the notice be put into the post-office nearest to the place where the protest was made, and *secondly*, that it be addressed to the party to be notified, at his domicile or usual place of residence; and the omission of either will be fatal.

A notice of protest addressed to a party, at the post-office from which he receives his

* The original judgment was rendered by the Circuit Court in Mississippi, 10th June, 1840; the order of seizure and sale was granted by the District Court in this State, on the 11th August following; and the injunction issued by the chancellor in Mississippi, on the 26th February, 1841.

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letters and the one nearest to his residence, or addressed to him, without indicating any particular place, and deposited in such post-office, will not be a sufficient compliance with section two of the act of 1827. The notice must, in addition, be addressed to him at his domicile or usual place of residence.

APPEAL from the District Court of Concordia, *Tenney, J.*

SIMON, J. The defendant is sued as endorser of two promissory notes, amounting together to \$5000, both dated at Vidalia, and made payable at the Planters Bank, Natchez. He pleaded the general issue; and the proof of notice to the endorser of the dishonor of the notes, having been deemed insufficient by the inferior tribunal, judgment of nonsuit was rendered against the plaintiff, from which he has appealed.

The evidence shows, that the notary who made the protest of the notes sued on, directed his notices to the defendant, one of which was addressed to him at Natchez, in the form of a letter, which he deposited in the post-office there; and the other was also addressed to him by name, without indicating any particular place, and deposited in the post-office at Natchez. It is further admitted, that the post-office from which the defendant receives his letters is at Natchez, Mississippi, which is the nearest post-office to his residence; and it appears, also, from the evidence, that there is no post-office in the parish of Concordia, and that the defendant resides in that parish, about three miles from the town of Vidalia.

F. H. Farrar, for the appellant, contended that the notices were sufficient. They were in strict conformity to the true sense and meaning of the law. Citing *Bank of Columbia v. Lawrence*, 1 Peters, 478. Walker's Miss. Rep. 526. 1 Pickering, 411. 15 La. 38, 51. 16 Ib. 282, 308.

Sparrow and *Elgee*, contra. Previous to the act of 1827, this court had repeatedly decided that post-offices were not proper places of deposit for notices of protest. *Clay v. Oakey*, 5 Mart. N. S. 137. Ib. N. S. 158, 360. *Louisiana Bank v. Rowel et al.* 6 Ib. N. S. 506. *Pritchard v. Scott*, 7 Ib. N. S. 491. In the case of *Porter et al. v. Bayle et al.* 7 La. 170, the defendant resided in the *faubourg* Livaudais, and notice was given by depositing the letter for him in the post-office in New Orleans, addressed to him in that city. The court declared this, "*per se*, clearly insufficient to prove due notice, whatever may have been

the domicil of the endorser," because, if he resided within the city of New Orleans personal notice was necessary; if beyond the city, it should have been addressed to him at his domicil or usual place of residence. Some recent decisions, which may appear at first to be in opposition to the previous decisions of the court, will be found, on examination, not to be so. In the case of the *Bank of Louisiana v. Watson*, 15 La. 38, the notice was "deposited in the post-office in the town of Baton Rouge, directed to the defendant in the parish." In *Harrison v. Bowen*, 16 La. 282, cited by the counsel for the appellant, the decision was against the defendant, because he had agreed to receive notice. In *Brent v. Cheevers*, Ib. 23, the court declared the notice insufficient, "as it was not directed to the defendant at his domicil or usual place of residence, five miles from which there was another post-office." If the act of 1827 made any change in the commercial law in regard to post-offices as places of deposit for notices, it was on the condition that the notices "should be addressed to the endorser at his domicil or usual place of residence."

SIMON, J. The second section of the act of the thirteenth of March, 1827, which is relied on as properly applicable to the present case, as this court had occasion to say in the case of *Preston v. Daysson, et al.* 7 La. 11, does not change the usage of commercial law in relation to the diligence to be used in serving notices of protest, but merely provides a new mode of proof of such diligence. It is provided in the second section, that "whenever such endorsers shall not reside in the town or city where protest shall be made, then, and in such case, it shall be the duty of the notary to put *into the nearest post-office* where such protest is made, a notice thereof to such endorsers, *addressed to them at their domicil or usual place of residence.*" This statute, therefore, seems to require two formalities: *first*, that the notice should be put into the nearest post-office where the protest is made; and *secondly*, that such notice should be addressed to the endorser at his domicil or usual place of residence. Now, under the first section of the same act, the certificate of the notary that these formalities were complied with, by showing the manner in which they were fulfilled or executed, ought to be considered as sufficient evidence of all the matter therein stated; but, as this law is one of

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those which it has pleased the legislature to enact in derogation of the general commercial law, we are by no means satisfied that its requisites should not be strictly observed, or that the mode of proof, which it provides for, should be received or resorted to as sufficient evidence of notice, unless the requisites or formalities therein prescribed are shown to have been strictly complied with.

With this view of the effect, construction, and application of the law of the thirteenth of March, 1827, relied on by the plaintiff's counsel, we agree with the judge *a quo* that the notary's having failed to address his notices to the defendant at his domicile or usual place of residence, is a fatal objection to taking the facts by him stated in his testimony as a sufficient compliance with the requisites of the said law, or as satisfactory proof that due notice was given to the endorser.

SAME CASE—APPLICATION FOR A RE-HEARING.

In an action in this State against the endorser of a note, dated at a place in this State in the parish in which the endorser resides, payable in another State, the presumption will be, until the contrary is shown, that the note was endorsed at the place of its execution; and the obligation will be governed by the *lex loci contractus*.

Notice of protest to an endorser, put into the post-office at the place where the note was payable and at which he was in the habit of receiving his letters, addressed to him there, is insufficient by the law of Mississippi. Otherwise, in this State, since the act of thirteenth of March, 1827.

SIMON, J. The plaintiff and appellant has prayed for a re-hearing on the grounds: *First*, That the statute of 1827 does not apply, because the notes sued on were not made payable in this State, but in the State of Mississippi, and there is no proof that they were executed in the State of Louisiana. *Secondly*, That the *lex mercatoria* prevailing in all the States of the Union, ought to govern the present case; and if so, that this court cannot hesitate to decide that, under the peculiar circumstances which it presents, the party was dispensed from the necessity of personal service, and that the defendant was legally notified.

I. It is true that the notes sued on were made payable in the State of Mississippi; but they are dated at *Vidalia*, and this circumstance alone is sufficient to show that they were executed in the parish of Concordia, within the limits of the State of Louisiana. The defendant resides in that parish, and until the contrary be shown, we may fairly presume that he endorsed them in the place where they were executed. If so, it is clear that his obligation must be governed by the *lex loci contractus*, and not by the *lex loci solutionis*, and that his liability should be tested according to the provisions of our laws.

II. But even supposing the plaintiff right in his position, that the *lex mercatoria* ought to govern the liability of the defendant in this case, we are unable to see how it could avail him. It is shown by the evidence that the defendant resides about three miles from the town where the notes were made payable, and that the notices were put into the post office at that place, addressed to him; and it is also shown that the defendant was in the habit of receiving his letters at that post office. We can hardly distinguish this case from that of *Glenn v. Thistle*, 1 Robinson, 572, in which this court held, that the doctrine established by the Supreme Court of Mississippi in the case of *Patrick v. Beazely*, (also strongly analogous to the present one,) appeared consonant to the commercial law, as recognized in several States; and that, regarding it as evidence of what the law is in the State of Mississippi, the notice of protest, then under consideration, was insufficient. This case does not, in our opinion, present any circumstance which should take it out of the general rule recognized in the case above cited, under a proper application of the commercial law. The re-hearing applied for is, therefore, refused.

Judgment affirmed.

THE PRESIDENT AND DIRECTORS OF THE GRAND GULF RAIL
ROAD AND BANKING COMPANY v. STEPHEN DOUGLASS.

A certificate by the clerk, that the record "contains all the evidence upon which the judgment appealed from was rendered," is insufficient.

Where the appellee has answered to the merits, and the record is so defective that the case cannot be examined, and justice requires that it should be tried *de novo*, the judgment of the lower court will be reversed, and the case remanded.

Where the evidence has not been taken in writing, it is the duty of the appellant to require the adverse party to join him in drawing up a statement of the facts, or, in case of disagreement, or refusal by the other party, to apply to the court to make such a statement, in order that the clerk may prepare a complete record of the case.

APPEAL from the District Court of Madison, *Tenney, J.*

F. H. Farrar, for the appellants.

T. N. Peirce, for the defendant.

SIMON, J. This case comes up in a very imperfect and incomplete state. The record contains no statement of facts, and the certificate of the clerk that the transcript *contains all the evidence upon which the judgment appealed from was rendered*, is so insufficient, that this alone would perhaps entitle the appellee to a dismissal of the appeal, if he had chosen to move for it.

But the defendant, who is the appellee, filed his answer to the merits, and prayed that the judgment might be amended, and given for a less amount. This would, perhaps, preclude him from moving for a dismissal of the appeal.

On the other hand, an attentive examination of the record has convinced us that the case is not in a situation to be tried on its merits. The record shows, on its face, that all the evidence adduced on the trial has not been brought up; and a bill of exceptions found in the transcript, shows that other evidence was adduced, which has not been copied in the record.

Under such circumstances, we think that, without inquiring from whose fault the record comes up in so defective a form, this is a case which justice strongly requires should be tried *de novo*: and, for this purpose, we are compelled to annul the judgment of the court below, the correctness of which it is impossible for us to examine.

We think proper to remark, however, that had the appellee
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moved for a dismissal of the appeal, before filing his answer to the merits, we should have thought it our duty to dismiss it, as the appellants have not shown themselves disposed to have the record corrected and completed by obtaining a writ of *certiorari*, under the provisions of the act of 1839, and as the imperfect state of the record must in some measure have proceeded from their neglect. It was their duty to attend to the clerk's making a correct transcript of the evidence, by getting the defendant to join in making out a statement of facts, or, on his refusal, by making application to the judge *a quo* for that purpose. Code of Prac. art. 603.

It is, therefore, ordered, that the judgment of the District Court be reversed, and that this case be remanded to the court below for a new trial according to law ; the appellee paying the costs of this appeal.

THE PRESIDENT AND DIRECTORS OF THE GRAND GULF RAIL
ROAD AND BANKING COMPANY v. STEPHEN DOUGLASS.

APPEAL from the District Court of Madison, Tenney, J.

SIMON, J. This case is, in its nature, similar to the one just disposed of between the same parties, and although the evidence is not so incomplete as in the preceding case, and appears to have been mostly, if not entirely, copied into the record, yet the certificate of the clerk, which is in the same words as in the other case, does not satisfy us that the transcript contains all the evidence adduced by the parties, and that we could do justice to their respective pretensions, if we were to try the case on its merits. In justice also to the judge, into the correctness of whose judgment we are called upon to inquire, we think that we ought not to investigate the case, if, on the examination of the record, we find that the whole evidence upon which it was tried is not before us.

This case must, therefore, have the same fate as the other ; and in order to have it tried *de novo*, we are constrained to annul the judgment appealed from.

It is, therefore, ordered, that the judgment of the District Court

Wells and another v. Compton and another.

be annulled and reversed, and that this case be remanded to the court below for a new trial according to law; the appellee paying the costs of this appeal.

F. H. Farrar, for the appellants.

T. N. Peirce, for the defendant.

MONTFORT WELLS and another v. JOHN COMPTON and another.

3r	171
109	484

Where the meaning of an instrument is uncertain, the record of another suit, by a different plaintiff, but to which the defendant was a party, will be admissible in evidence to show, by the acts and declarations of the latter, what his understanding of the instrument was. The present plaintiffs, not having been parties to the suit, cannot avail themselves of the statements in the pleadings as judicial admissions, absolutely conclusive of the rights of the defendant. They must be considered simply as other declarations.

3r	171
119	660

Surveyors' plats, made under the order of court, in a suit to which defendant, against whom they are offered, was a party, though the plaintiff was not, are admissible in evidence as circumstances, so far as they show acts of the defendant.

Where the intention of the parties to a contract is doubtful, under art. 1951 of the Civ. Code, the court will inquire into the whole conduct of the parties in relation thereto.

The statements of witnesses taken down in a suit, by a different plaintiff, but to which the defendant was a party, cannot, as a general rule, be received in evidence against the latter. *Aliter*, where the testimony of a witness so taken down is offered to discredit the evidence subsequently given by him; or where the declarations of a deceased surveyor are offered to explain his operations.

Parish Surveyors are regularly appointed officers known to the law, and when dead, their declarations, taken in other suits, may be used, when necessary, as evidence to explain their acts. So plats made by a Parish Surveyor under orders of court, in a suit to which defendant was a party, are admissible after the decease of the former, to prove the declarations of the defendant made at the time of the survey.

The record of another suit, when offered to support a plea of *res judicata*, is admissible to show what the parties claimed, and what was decided in such suit. So the record of another suit, to which the plaintiffs were parties, though joined with others and in a different capacity, is admissible against them, when offered by the defendants, who were plaintiffs in that case; the latter are entitled to the full benefit of any decision made on the rights of the parties, and to show that the plaintiffs have compromised any of their rights by that suit.

The official acts and certificates of Parish Surveyors are entitled to full faith and credit, in all of the courts of this State.

The *procès-verbal* of a survey made by a Parish Surveyor, is legal evidence of the acts which it recites, as that notice was given, that the parties attended, &c.

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In the interpretation of contracts, the intention of the parties is to be ascertained, and effect given to it, and to all the clauses of the contract. No construction is to be given which will render important expressions useless. The intention must be determined by the words of the contract, if possible; but where the intention is doubtful, the interest of the parties, or other contracts, may be referred to. Where a clause is susceptible of two interpretations, it must be understood in that sense in which it will have some effect. So, the manner in which it has been executed, or acted under, by both parties or by one, with the express or implied assent of the other, also furnishes a rule of interpretation. Finally, in doubtful cases, the construction must be against the party who has contracted the obligation.

The vendor of a tract of land is bound to put the purchaser in possession; and where he sells at different times by separate portions, without boundaries, to different persons, the first purchaser must be satisfied before a second can obtain any portion of his.

In all surveys, courses and distances must yield to natural and ascertained objects.

APPEAL from the District Court of Rapides, *Waters, J.*, presiding.

GARLAND, J. The petitioners represent themselves to be the owners of a tract of land containing six hundred *arpens*, more or less, on the left bank of the bayou Bœuf, adjoining Dent's estate below, and bounded above by the defendants'. They aver that the upper limit of their land is at the *first turn* of the bayou below the main Biloxi village, where the lower limit of the land of the defendants commences. They allege that the defendants were informed, and well knew of their rights, particularly from a survey made in their presence, but have, notwithstanding, taken possession of a part of their land on the bayou and on the back line, without any title, and that they refuse to surrender it. The plaintiffs state that they derive their title to the land, from a purchase made at the probate sale of the estate of Samuel Levi Wells, in the year 1829.

The petitioners further allege, that after the survey was made of the land in controversy, the defendants promised and agreed to surrender the same, but have since refused to comply with their agreement, and continue to hold possession. They pray for a judgment for the land, and for \$2000 damages for its illegal detention.

The defendants answer, after a general denial, that Samuel L. Wells, the ancestor of the plaintiffs, owned twenty-five *arpens* front, by a *depth of forty*, on the left bank of the bayou Bœuf, bounded above by lands owned by George Mathews, which land

Saml. L. Wells sold to L. B. Compton, one of the defendants, from whom the other obtained title, and that the land thus sold was to include the Biloxi village. They deny that they are in possession of any land owned by the plaintiffs, and aver that, on the contrary, the plaintiffs are in possession of the lower part of the tract sold by their ancestor to L. B. Compton ; and they now claim, in reconvention, the portion of land within their limits, defined by a line commencing at the lower line of Mathews' estate, and running down twenty-five *arpens*. They pray that they may be quieted in their title to said twenty-five *arpens* front, and may recover \$5000 damages from the plaintiffs for their wrongful detention of the land.

Several years after the commencement of this suit, the plaintiffs amended their petition, claiming damages of the defendants to the amount of \$10,000, to which the latter responded, that, they have possessed in good faith, and if made responsible for rent or damages, that they are entitled to be paid for clearing the land, and for improvements put on it, worth \$5000, which they claim in reconvention. They also present a plea of *res judicata*.

An agreement was entered into, by which the depositions of several witnesses, previously taken in other suits, were to be used as evidence in this, if admissible under the allegations, waiving all objections to the form of taking them.

The cause was continued from term to term for about ten years, several times upon the affidavits of the defendants or their counsel, and, at other times, without cause being shown. Some of the statements, in one or more of these affidavits, it will be necessary to notice hereafter.

On the trial, it was shown that Samuel L. Wells was the proprietor of a part of the Indian claims on the bayou Bœuf, purchased by Miller and Fulton, the history of which is given in the cases of *Compton v. Mathews* and *Wells' Heirs v. Compton*, (3 La. 128, 164,) and in some other cases. S. L. Wells claimed to be the owner of sixty-five *arpens* front, and, before the claim was acted on by the land officers of the United States and Congress, he claimed a depth of eighty *arpens*, on each side of the bayou ; but his claims were finally confirmed for only

forty *arpens* in depth on each side. A probate sale of a portion of this tract of land, was exhibited, showing that the plaintiffs had become the purchasers of six hundred superficial *arpens*, more or less. If there was more, they were to pay for the excess, at the rate of \$12 50 per superficial *arpent*; if less, there was to be a deduction of price at the same rate. The plaintiffs, therefore, purchased whatever quantity of land might be found in the tract. It was further shown that, in the year 1808, Saml. Levi Wells agreed to sell "all his right, title, and interest" in and to fifteen hundred superficial *arpens* of the Indian lands to Leonard B. Compton, at the rate of two dollars the superficial *arpent*, payable in one, two, and three years, without interest. Five hundred *arpens* were to be on the west side of the bayou, and about these there is no controversy. The thousand *arpens* were to be laid off as follows: "The lower line to commence on the east side of the bayou Bœuf, and at the first turn in the said bayou below the main Biloxi village, and to run twenty-five *arpens*, one hundred and eighty feet to the *arpent*, measure of Paris, up the said bayou, *parallel* with the base line of the whole tract of the Indian claim, as it was run by Frederick Walther; a line then to start at the upper end of the twenty-five *arpens* line as above, and to run at right angles with the course thereof, *till* it strike the said bayou, and then meandering with the said bayou to the beginning. And if there should not be one thousand *arpens* of land within the lines above mentioned, whatever may be wanting of said one thousand *arpens*, to be laid off on the back of the first line, in parallel lines, and the course of the line running at right angles to the first, to be continued." The tract of five hundred *arpens* was to be laid off with a front of twelve and a half *arpens*, with forty in depth. Samuel Levi Wells "engages with the said Leonard Compton, his heirs, &c., that in case the consideration money, or any part thereof should be paid, and after such payment being made, the claim of him, the said Wells, to the said land, on the final decision thereon be condemned and rejected, that then, in such case, the sum or sums so received by said Wells, his heirs, &c., shall be refunded or repaid to said Compton, his heirs, &c., without interest." It is further stipulated, in case the claim should not be confirmed, that Wells is not to be

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liable for any improvements which Compton may put on the land. At the date of this sale, the defendants were living together on the land, and had their buildings on, or very near to the site of the Biloxi village, which was a well known place. The defendant John Compton, who afterwards purchased half of Leonard's interest, and, since the commencement of this suit the other half, has ever since occupied the place. From the Biloxi village, the bayou runs in a nearly straight course for a considerable distance, bearing a little to the left as represented by the survey; it then changes its course and curves gradually, until it forms a figure nearly resembling a horse shoe, the points or heels drawn close together. At the point where the bayou begins to deviate from its nearly straight course, and forms the upper part of the curve, is an elm tree, which has become celebrated from this controversy; and the public road from Alexandria strikes the bayou at nearly the same point.

About the year 1810, Philip B. Compton, a brother of the defendants, settled on the bayou about the apex of the curve, where he built a house, and cleared and cultivated the land for some distance above and below him. He remained at that place, until about the year 1820, when he moved into another house near the elm tree, where he lived for several years. The defendants contend that Philip B. Compton settled there with their permission, and held under them. The plaintiffs say that he was an intruder, or was there by permission of Samuel Levi Wells. That P. B. Compton was there during the lifetime of Samuel Levi Wells, and with his knowledge, there is no doubt. It is also very clear that Wells was very intimate and friendly with him, and with the defendants, up to the time of his death in 1815, and particularly with L. B. Compton, to whom he sold the land; and it is also evident, that no act of sale was made by the defendants to Philip B. Compton until 1825, some short time after which he re-conveyed to them.

The evidence leaves it doubtful whether a line was ever established, with the consent of S. L. Wells, below the improvements of P. B. Compton. That there is a line there, represented on the plat by the line 4 H, is certain, and that it was an old line in 1841. It commences at the lower part of the curve, and runs parallel with

the other lines. In the *procès-verbal* of a plat made under the order of the court in this case, dated in February, 1842, McCrummen, the surveyor, says, it was laid off "some few years since." In the *procès-verbal* of another plat made by McCrummen, the same line is represented; and he says that, at the request of Samuel L. Wells, he had laid off the whole tract of sixty-five *arpens* front, only with a view to ascertain where the lower line would cross the bayou, and "where the several intruders on the land were situated on the bayou. Such part of the lines as are dotted on the plat were not marked in the woods." This line is not a dotted one, but the plat has no date, and it is shown by the record, that Samuel L. Wells had a son of the same name. Whether this plat was made at the request of the father or son, does not appear; but it is certain that the former died in 1815, and the law creating the office of Parish Surveyor was not passed until March, 1818. But if Samuel L. Wells, the vendor of Compton, did put him in possession by such a survey, there is no accounting, on fair principles, for the suit instituted by Leonard B. Compton against Mathews in 1820, as the line of the latter is on this plat exactly as he contended it should run, and as Compton said it should not. The best construction, therefore, which we can put on it, is, that the plat was made at the request of Samuel L. Wells, the younger, and does not, therefore, bind the plaintiffs. Alex. Compton, a witness for the defendants, says in his deposition, that he does not know that Samuel L. Wells ever caused this line to be run or marked, but that he recollects that in the year 1813, Wells visited the defendants soon after the line was run, and, in company with them and witness, examined the line and marks or posts, when some conversation took place between the parties about the line. That Wells made no objection, but appeared to be satisfied, and so expressed himself. It is shown that this witness, at the time of giving his deposition, was in Texas, a fugitive from justice; and further, it is clear, that if he told the truth in this instance, he testified falsely in the case of *Compton v. Mathews*, which case was tried ten or eleven years ago. His testimony in that case was taken down in writing, and has been offered in this, and cannot be reconciled with his present statements. The statement of the Surveyor, in his *procès-verbal*, does not, therefore, fix the period when

this line was run, and we do not think Alexander Compton a credible witness ; so that all the testimony proves is, that the line is there, and that Philip B. Compton's improvements extended down towards it, below the elm tree.

In the year 1820, Leonard B. Compton, in whom the title to the land purchased from Samuel Levi Wells was then vested, commenced a suit in the District Court against the late Judge Mathews, alleging himself to be the owner of the tract of land described in the deed from Wells to him. In his petition he describes the land almost in the words of the deed, and says that he has had it surveyed by McCrummen " according to the above description, a plat of which is herewith filed, and ready to be exhibited on the trial of this suit." This plat was withdrawn from the record of the suit of *Compton v. Mathews*, by the attorney of the former, after its decision, but subsequently to the commencement of this suit. A duplicate of it has, however, been offered in evidence, and it shows that the defendants then claimed that the point of beginning should be at the elm tree, on the upper curve of the first turn or bend ; and the plats of survey filed in that suit, and the case itself, show that the defendants persisted that it was the true point of beginning, until the case was finally decided in favor of Mathews. 3 La. 128.

It is also shown that, at the time of the sale from S. L. Wells to L. B. Compton in 1808, the Indian claims were not recognized by Congress or by the Land Commissioners. There had been a partition of the land between Clark, Fulton, Wells, and Miller, the co-proprietors, on a map which had been made by F. Walther, but as the country was covered, at the time of the partition in 1803 or 1804, by a heavy forest and stiff cane-brake, no dividing lines seem to have been traced, and it was in that condition when the sale from Levi Wells to L. B. Compton was made.

These are the material facts of the case. Some others of minor consequence we shall touch upon, in connection with the different points that will arise. Upon these facts, and the law, as the judge below, after a laborious examination, understood it, a judgment was given in favor of the defendants, and, upon their demand in reconvention, against the plaintiffs, for the land in their possession down to the line marked on the plat of the surveyor Phelps, 4, H ; from which judgment the plaintiffs have appealed.

Elgee, and *Dunbar*, for the appellants. The language of the deed is unambiguous. No doubt was ever entertained by the defendants as to the proper point of beginning the line, until after the decision in the case of *Compton v. Mathews*, 3 La. 128. In construing any agreement, the great object must be to ascertain the intention of the parties, at the time of the contract. Civ. Code, art. 1940. 12 La. 546. The rule that obscure or ambiguous clauses are to be construed against the vendor, is one of extreme severity, and to be resorted to only when all other modes of interpretation have failed. 3 Toullier, (Bruss. ed.) p. 447-8, Nos. 318-325. The acts and declarations of the defendants, furnish conclusive proof as to the correct point of departure. Civ. Code, art. 1951. In the case of *Compton v. Mathews*, we find the defendants, as far back as 1820, fixing the point of commencement at the elm tree. Their instructions to McCrummen, the surveyor, were to the same effect. The action against Mathews could only have been maintained, on the allegation that the elm formed the correct point of departure. As to the admissibility of the record of the case of *Compton v. Mathews*, see 2 Starkie Ev. 17, 22-24. 2 Phillips, Cow. & Hill's ed., 201, 205, 206, 207, 212, 213, and the authorities there cited. As to the admissibility of the declarations of deceased surveyors, see 1 Starkie Ev. 25-29. 2 Phil. Ev., Cowen & Hill's ed., 628-639. 6 Peters, 341. 7 Cranch, 296. Peters' C. C. R. 496. As to depositions taken in a former suit to which one of the present parties was a party, see Chitty's Eq. Dig. 991. The real intention of the parties, in 1808, was, that the defendants should take a fair proportion of back and front land for their thousand *arpens*. Parties cannot be permitted to deny in one suit, what they have alleged in another. Coke's Inst. 352. 10 Mass. 155. 2 Phil. Ev., Cow. & Hill's ed., 201, *et seq.*

The plaintiffs do not claim as heirs of S. L. Wells. The defendants must resort to an action of warranty against the heirs, for any deficiency in the land purchased by them. The rule, that the first purchaser shall take the whole of his portion, and the second, only what remains, does not apply to a case like the present, where the sale was by specific metes and bounds, and a part of those bounds natural ones. 4 Wash. C. C. R. 415. Admitting that the language of an instrument is to be most strongly construed

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against the vendor, the utmost latitude to which the rule could be extended would be, to consider it, in case of doubt, as to a natural object, as giving to the vendee the right of selection. In this case the defendants have made their selection, by adopting, in their suit against Mathews, the elm as the true point of beginning. When such a selection has been once made, it is binding. There has been no mistake in the boundaries, on the part of the defendants; and such mistakes can only be corrected, when manifest. The purchase made by the plaintiffs at the probate sale of their father, S. L. Wells, was in 1829, many years after the institution of the suit of *Compton v. Mathews*, in which the defendants contended that the elm was the proper boundary of their land. The plaintiffs may have been influenced by this circumstance, in making their purchase; and the defendants are estopped from gain-saying their own allegations in that suit. 2 Phil. Ev., Cowen & Hill's ed., 200, 205-7, *et seq.*

O. N. Ogden and T. H. Lewis, for the defendants. Under the deed from Saml. L. Wells to L. B. Compton, the defendants are entitled: *first*, to a front of twenty-five *arpens*, in a line parallel with Walther's base; *secondly*, to the quantity of one thousand *arpens* on the east side of bayou Bœuf, within the Miller and Fulton grant. These points being settled, to wit, the extent of front, and the quantity, there can be no difficulty in fixing the proper place of beginning. According to the deed, we must begin at the first turn in the bayou below the main Biloxi village. This expression, which, by itself, would be indeterminate, is rendered sufficiently clear by the context. Taken in connection with the two controlling expressions before noticed, it can only mean such a point, within the turn, as will give the front and quantity mentioned. This court has already decided in the case of *Compton v. Mathews*, 3 La. 128, that any part of the turn will satisfy this condition of the title; and such a construction must be adopted *ut res magis valeat quam pereat*. Code of 1808, 270. Civ. Code, arts. 1943, 1946. Comyn on Contracts, 23, 24. As the plaintiffs claim to run the line, starting from the elm, the defendants will have but fifteen and a half *arpens* front, and cannot obtain the quantity to which they are entitled. It has been urged that this was a sale *per aversionem*, and that the description of the boundaries

must control the other expressions of the deed. But the lower boundary has been shown to be indefinite, and we contend that that the upper boundary is exactly twenty-five *arpens* from the point, within the curve, at which the lower one is fixed; and this is the very question, which the court is now trying. The case of *Compton v. Mathews*, the record of which has been offered in evidence, is *res inter alios acta*. The plaintiffs in this action, were not parties or privies to that; and though it should be shown that the defendants were, the record could not be received for want of mutuality. 1 Starkie Ev. 221, 266, 267. 1 Munford's Rep. 402, 403. 2 Cond. Rep. 496. 3 Ib. 465. Gill & John. 34-5. One of the present plaintiffs was a witness in that case, for which reason the record should be excluded. 1 Stark. 221. Another ground for its exclusion, is, that the suit did not involve the question to be determined in this. 1 Stark. 324. The testimony of McCrummen is inadmissible. The boundary in dispute is not an ancient one, and hearsay evidence cannot, under such circumstances, be received. 1 Stark. 33-4. 7 Cranch, 293. 10 Peters, 434, *et seq.* But, if admissible, it would not be conclusive. It tends to prove an error in fact on the part of the defendants; and a location made in error is not binding. 3 Mart. N. S. 11. 6 Ib. N. S. 701. 2 La. 499. 12 Ib. 544. Even a judicial admission may be revoked, in case of an error in fact. Code of 1808, 314. Civ. Code, art. 270. 1 Whites' New Recop. 292.

Both parties claiming under S. L. Wells, the defendants' purchase, being the earliest, must be first satisfied. Civ. Code, art. 843. 9 Mart. 81. 6 Mart. N. S. 700, *et seq.* The deed from Wells to L. B. Compton, must be so construed as to give effect to all its clauses. Civ. Code, arts. 1940, 1941, 1943, 1946, 1950. 12 La. 546. If there be any ambiguity, it must be construed most favorably to the vendee. Civ. Code, arts. 1952, 2449. Plaintiffs being purchasers from Wells, have no greater rights than he had. The vendor is bound to deliver the whole extent of the premises sold, in the exact form stipulated. Civ. Code, arts. 2467, 2468. Pothier, Vente, 47, 48. Admitting the surveys relied on by the plaintiffs to be legal evidence, if not in conformity to the titles they can neither give, nor take away any thing. 3 Mart. N. S. 12-16. 6 Ib. N. S. 701-2. 2 La. 502. 12 Ib. 545.

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GARLAND, J.* In this court, in addition to the able opinion of the judge, we have had the benefit of an argument distinguished for its ability, and of the counsel of one of our associates, who was not present when the cause was tried.

The first question by which we are met, is a plea of *res judicata*. It appears that in the year 1830, the plaintiffs, with their three co-heirs in the succession of Samuel Levi Wells, instituted a petitory action against the defendants, in which they claimed of them fifteen hundred *arpens* of land—five hundred *arpens* on the west side of the bayou Bœuf, and one thousand *arpens* on the east side, situated at the Biloxi village, bounded above by the plantation of Judge Mathews. They claimed, by inheritance from their father, his rights derived from the Indians, through Miller and Fulton. In answer to that action, the defendants set up as their title, the same deed of conveyance now presented, in which there is a clause that the legal title to the land is to remain in Samuel Levi Wells until Leonard B. Compton shall have paid the price; and as there was no record evidence of his having paid it, the plaintiffs hoped to recover, supposing that he had not done so, or could not prove it, if he had. The case turned on that question entirely, as an inspection of the record, and the decision of this court, in 3 La. 164, will show. The plaintiffs failed in that suit, but it will be seen that the matters now in controversy were not involved in it. There was no question of boundary, nor was it the purpose of the parties to fix the point of commencement under the deed. The judgment says, that the plaintiffs shall take nothing by their suit, and quiets the defendants in their possession and title to the land claimed. But the question where that land is, was not in any manner touched or decided. The judgment gives no more than the deed gave. Besides this, the parties are not claiming in the same capacity, nor by virtue of the same right. This suit is in effect an action of *bornage*. The plaintiffs do not dispute the validity of the defendants' title, so far as it goes, but allege that they have got possession beyond the true boundary. The case does not come within the meaning of

* BULLARD, J. having been of counsel in this case, did not sit on its trial.

article 2265 of the Code, and the settled doctrines of this court. 7 Mart. N. S. 430. 5 La. 474. 19 La. 318.

A number of bills of exception were taken on the trial to the opinions of the judge admitting or rejecting testimony, which we will proceed to notice.

The first was taken by the plaintiffs to the opinion of the court rejecting as evidence, the record and depositions in the case of *Leonard B. Compton v. George Mathews*. They offered them to prove, *first*, that *that* suit and the present are substantially the same, viz. to fix the boundaries of the tract of land sold by Samuel L. Wells to L. B. Compton, now, in controversy; *secondly*, to show that L. B. Compton claimed that the elm tree in the first turn of the bayou below the Biloxi village, was the proper point of beginning, from whence to survey the land claimed by him at that time. But the court rejected all "the evidence, except the record to prove *rem ipsam*, and the testimony of Kenneth McCrummen as hearsay evidence, and the plats referred to in his evidence." The grounds of objection are stated by the judge in a very long opinion. We think that he erred in confining the evidence to the narrow grounds which he did. He ought to have admitted it, to prove the acts and conduct of the party, and have given them their legal effect. The great question at issue, was, where was the true point, to begin to run the twenty-five *arpens* line. As the contract did not fix it in a manner satisfactory to all parties, the declarations and acts of the parties contesting were admissible, to prove what their understanding of the agreement was. The judge says, there is no doubt but that the declarations of Leonard B. Compton would be admissible to show that the elm tree was the proper point of beginning. If his parol declarations were admissible, we see no reason why his declarations in a petition, filed in court, should be rejected. As the plaintiffs were not parties to that suit, they cannot avail themselves of the statements so made as judicial admissions, absolutely binding on the party, and conclusive as to his rights; but we have no doubt that the allegations made, ought to be considered as other declarations would be, and as such as forming a link in the chain of circumstances going to prove that the plaintiffs and Compton at one time entertained the same opinion, as to the meaning of the expressions in

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the deed. The plats made under the order of the court, so far as they show acts of the party, ought also to have been admitted as circumstances, and proper consideration should have been given to them. The general rules in relation to the interpretation of contracts, require us to examine the whole conduct of the parties in relation to them, and thereby judge of their meaning. Civ. Code, art. 1951. The statements of the witnesses taken down in the suit of *Compton v. Mathews*, cannot be received as evidence for the plaintiffs, unless it be perhaps the declarations of the deceased surveyor to explain his operations, or to use them, as in the case of Alexander Compton, to discredit the evidence given on this trial. 8 Mart. N. S. 382. 13 La. 76.

The next bill of exceptions was taking by the defendants, to the opinion of the court receiving in evidence a plat made by McCrummen, the parish surveyor, of a survey made by him under the order of the court in the case of *Compton v. Mathews*, and also his testimony on the trial of that case. The judge admitted it as hearsay testimony, to show the directions and requests of L. B. Compton, when the survey was made to establish the boundaries of the tract of land purchased by L. B. Compton of Samuel L. Wells. It was proved that McCrummen and the chain carriers were dead, and that he was the parish surveyor, and had made the survey under the order of the court. We think the judge did not err. Surveyors are officers known to the law, appointed by the Governor and Senate; they give bond, and take an oath to perform their duties; they are required to keep a record of their proceedings, and to give copies, which are evidence in the different courts of the State. B. & C. Dig. 796, sec. 1, p. 798, sec. 10. They are specially required faithfully to execute all orders of survey directed to them by any of the courts in the State; and they make surveys generally. Ibid. p. 796, sec. 4. The acts of such officers are entitled to due weight, and if they are dead, we see no objection to appealing to their recorded testimony in a suit, to explain their acts, when it is required or necessary to understand them. 2 Phillipps on Evidence, 629, 632, 633, 634, 635. 6 Peters, 341. 7 Cranch, 296.

The defendants offered in evidence the record of the suit of the heirs of *Wells v. J. and L. B. Compton*, for the purpose of sup-

porting their allegation of the plaintiffs' rights having been precluded and settled by it. The latter objected, on the ground that the case was between other parties and for a different cause of action. The judge would not receive it as evidence, but admitted it to prove *rem ipsam*, and the defendants excepted. We think the judge should have admitted the record, to prove what the parties claimed, and what had been decided, and have given it such legal effect as it was entitled to. The objections seem to have been more to the effect of the evidence, than to its admissibility. The plaintiffs were parties to that suit, though in a different capacity, and connected with others; yet, if they had impaired or compromised any of their rights by that suit, or the court had decided on them, the defendants certainly had a right to the full benefit of every thing that had been adjudged. 2 Chitty's Equity Digest, 990, 991.

In relation to the defendant's bill of exceptions to admitting in evidence the plat of the whole Indian claim, approved by John Dinsmore, Principal Deputy Surveyor, we do not think that the judge erred. There is no doubt that the certificate was sufficiently formal, and the effect of the plat should have been considered.

The defendants excepted to the opinion of the judge, excluding the sixth, seventh, ninth, and tenth interrogatories propounded to Alexander Compton, and the answers thereto, on the ground that the interrogatories contained leading questions. The judge, we think, erred. The interrogatories are somewhat of the character stated; they ask the questions in an affirmative and negative form, yet they do not, in our opinion, so clearly indicate the answers to be given, as to authorize their rejection entirely.

After the plaintiffs and defendants had closed their evidence, the former offered as rebutting evidence, a plat of survey signed by K. McCrummen, parish surveyor, and the record of the same; to which the defendants objected, on the grounds that this was not rebutting evidence, but evidence in chief; that the survey was an *ex parte* proceeding, not made under an order of court, or of other competent authority, and that none of the statements made in the notes were on oath; that the defendants were not present when the survey was made, nor ever notified to attend; and that it is not properly certified. This plat is dated in March, 1830. In

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the *procès-verbal*, the surveyor states that, at the request of one of the plaintiffs, he has surveyed, measured, and marked, the boundaries of a tract of land on the bayou Bœuf, in conformity to a sale made by Levi Wells to Leonard B. Compton, in the year 1808, for 1000 *arpens*. He states that he began at the elm tree on the next turn below the Biloxi village, and ran up parallel to the ascertained base of the Indian purchase. He then gives the courses, distances, marks, &c., so as to contain 1000 *arpens*. He states that written notices were given to the parties, that the survey would commence on the 15th March, 1830, and that John and Leonard B. Compton were present on the ground, and made no objection to the location of the tract. This plat is certified to be recorded in book A of the Records of Surveys, for the parish of Rapides, on pages 160 and 161, and the certificate is signed by the surveyor. The court admitted the plat, and notes of reference, so far as necessary to explain the same, on the ground that its introduction to that extent was authorized by law; but refused to receive the *procès-verbal* farther than it went to explain the diagram; and rejected that part which stated that the parties were notified, and that they were present at the survey, and made no objection thereto, on the ground that the surveyor could not legally give such a certificate. To the latter part of this opinion the plaintiffs excepted, and to the former the defendants took their bill of exceptions. Articles 829, 830, and 831 of the Civil Code specify in what manner a surveyor shall act, when called upon to fix the limits between adjacent proprietors. He must make a *procès-verbal* of his work, in the presence of two witnesses, called for the purpose. He is to notify the parties in writing to attend if they think proper, which he must mention, and to make a record of his proceedings and plans, and of all other necessary acts. We have before stated that, by different acts of the legislature, important duties are required of parish surveyors; and their official acts and certificates, when their duties are performed, are entitled to full faith and credit in all of our courts. The only serious defect we see in the *procès-verbal* of McCrummen is, that it is not attested by two witnesses; but the defendants did not object to it on that ground. They assert roundly that no such document can be given in evidence against them, for the causes before stated. We

think that the operations of parish surveyors, when reduced to writing, and represented by plats, as required by law, are legal evidence of what is stated in the *procès-verbal*. It is important that these records should be regularly kept, as they are the legal evidence of the establishment of boundaries. There would be but little security that boundaries would be permanent, if the *procès-verbal* made by the parish surveyor when fixing them, ceased to be evidence as soon as he was dead or out of office; and a defendant might compel a plaintiff to prove, in every instance, by parol testimony, that notices were given, and that the parties attended. In many cases this could not, from the lapse of time, be established; and in this, no other means exist of proving the survey but by the *procès-verbal*, the surveyor being dead. We are of opinion that the judge did not err, in receiving the document as far as stated in the defendants' bill of exceptions; but that he did err, in rejecting that portion set forth in the plaintiffs' bill. He should have received the whole document, and have weighed it, with other circumstances. Under art. 835 of the Code, a party is not prevented by such a survey, from resorting to a court of justice to rectify any erroneous proceedings or injury that may result from it.

The remaining bills of exception it is unnecessary to notice; and as we are approaching the merits of the case, it may be proper to mention a few other facts connected with it, and to recapitulate some already stated. There cannot be a doubt that, when Samuel L. Wells, in the year 1808, sold to Leonard B. Compton the quantity of one thousand superficial *arpens* on the east side of the bayou Bœuf, none of the parties knew where the dividing line between the lands of Fulton and Wells was; but that they only supposed where it probably would be. From the testimony of Josiah Johnston it is clear that no line had been marked, as he says that I. B. Compton and Mathews established a boundary, where they supposed it to be, several years after their respective purchases from the original proprietors. We have very little doubt but that both Wells and Compton believed it to be about twenty-five *arpens*, from the first turn in the bayou below the Biloxi village to Fulton's line, and that in the area they proposed to make there would be something approaching to one thousand superficial *arpens*. The proprietors of the Indian claims, at that

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time, contended that their depth was eighty *arpens* on each side of the bayou, or at the least forty *arpens*. For the latter quantity they were confirmed, and the location made by McCrummen gave that depth, which location was approved by John Dinsmore, Principal Deputy Surveyor for the south-western land district, who had authority to do so. In the answer filed by the defendants in this suit, they admit that, at the time of the sale from Samuel L. Wells to Leonard B. Compton, the former was the owner to a depth of forty *arpens* from the bayou, and on the western side the sale specially conveys to that depth. Had the location of McCrummen not been disturbed, there would be no necessity for the defendants to go below the elm tree, to get the quantity of land they claim, as there would have been a sufficient quantity back to give it; but it pleased the Commissioner of the General Land Office, and some other officers of the general government, to change this location since the commencement of this suit, whereby a line running from the elm tree, parallel with the upper line of the tract, has been so much shortened, that the quantity cannot be found. It does not appear from the record that the plaintiffs ever assented to this change, nor is it shown what particular agency the defendants had in effecting it; but it appears, from one or more of the affidavits made by John Compton, to obtain a continuance of the case, that he knew that such a purpose was agitated, and approved of it.

The main difficulty in this case is to ascertain the point on the bayou where the twenty-five *arpen* line is to commence. That once fixed, every thing else follows as a consequence.

The old Civil Code, page 270, articles 56 to 64, and the present Code, articles 1940 to 1957, lay down precise rules for the interpretation of contracts, and embody the principles contained in the best commentators on the jurisprudence of those countries, from whence we have drawn many of our laws. The decisions of this court have been based on them repeatedly; and the doctrine that the intent of the parties is to be ascertained, and effect given to it, and to all the clauses of the contract, have become legal axioms (8 Mart. N. S. 365); and no construction is to be given that will render important expressions useless. 9 Mart. 635. The intention of the parties must be determined by the words of the contract,

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if it can be done. Their interests must be looked to; and other words may be referred to, as may other contracts, when the intention of the one under consideration is doubtful. When a clause is susceptible of two interpretations, it must be understood in that in which it may have some effect. The manner in which one or both of the parties have executed the contract, or acted under it, with the expressed or implied assent of the other, also furnishes a rule of interpretation. Civ. Code, art. 1951. And finally, in a doubtful case, the agreement is to be interpreted against him who has contracted the obligation. Arts. 1952, 1953.

The doctrine that the seller must put the purchaser in possession of what he purchases, is admitted; and it is further admitted, that if one owns a large tract of land, the first purchaser must have his portion before a second one.

We will now analyze the contract of sale. *First*, a point was to be fixed, at the first turn of the bayou below the Indian village; *secondly*, a line was to run twenty-five *arpens*, parallel with the base line of the whole tract; *thirdly*, the line was to run to the bayou, and, with it to the place of beginning; *fourthly*, if the area thus formed, did not contain one thousand superficial *arpens*, the deficiency was to be laid off back of the line first run, between parallel lines, which were to be at right angles with the said line.

It is perfectly clear from this statement, that both Wells and Compton supposed, at the time, that the area made by them would comprise one thousand superficial *arpens*, and that the line first to be run would be a back line, if that quantity of land was found, if not, that the deficiency was to be made up back of it, between parallel lines. That they believed there would be an abundance of land in the rear, cannot be doubted, for the Indian claims were supposed to have been eighty *arpens* in depth, and the defendants admit that they were forty.

It is a well settled rule, in all surveys, that courses and distances must yield to natural and ascertained objects. The Supreme Court of the United States say it is a universal rule. 6 Wheaton, 580. 5 Cond. Rep. 194. The first turn in the bayou Bœuf is a natural object, and wherever that is, the line must begin. It is to be observed, that in this deed a peculiar phraseology is used. It does not use the general word *bend* of the bayou, but it speaks of

the *first turn* in it. The Civil Code, art. 1941, tells us, that the words of a contract are to be understood in their common and usual signification. Now we will suppose a man of common sense to be placed at the point where the Biloxi village stood, looking down the bayou, and to be asked where the *first turn* in the stream is? Can any one believe that he would point across the bend, to his right, and say it is there, or that it may be a little farther up, or that it may be any where on the lower or upper side of the bend. It may be well to state that, for some distance below the village, the bayou is nearly straight; it then makes a bend or curve for a considerable distance, and runs back again towards the same point. It appears to us, that the most common and usual signification of the *first turn*, would be the first clear deviation or deflexion from a direct course, or, at the most, that it could not go beyond the apex, or most projecting point in the curve.

Let us suppose, for a moment, that the line were to commence at the point contended for by the defendants; what would be the result? To run it parallel with Walther's base line of the whole claim, as laid down by Phelps, the surveyor would have at once to cross the bayou, and after running for a short distance on the west side of it, would be forced to cross again to the east, and after running for several *arpens* in the water, or very close to it, would go on his course, without having given a single *arpent* of land on the west side to the defendants, because they were not to have any there. Again, the point of departure contended for by the defendants, is about nine *arpens* below the point where the bayou first changes its direction, at the elm tree. We have said, that we do not doubt, but the parties to the sale supposed, that the area first described would probably contain one thousand superficial *arpens*; and taking this to be true, would it not have been a very vain thing to run a line along the front, or in the bayou, for eight or nine *arpens*, and not have thereby given the purchaser any land. He would have a line only, between the water and the land, on the banks of the stream belonging to the seller. Besides this absurdity, we are met by another. In prescribing how the area is to be formed, the deed directs certain lines to be drawn, and the meanderings of the bayou to be then followed to the place of beginning. If this be complied with, in order to get to the beginning,

for which the defendants contend, it would be necessary to cross the first, or twenty-five *arpens* line, or to run on it for eight or nine *arpens*, without adding once inch to the extent of the area. We can see no motive that the parties could have, for fixing a line that was not to give to one, nor take from the other; and it is not probable that any one would have extended a line a great distance, merely to cut off the front of his land.

But, say the counsel for the defendants, the line must have been intended to commence lower down on the curve, for it has been since ascertained that a line of twenty-five *arpens* in length cannot be run, beginning at the upper part of the curve, without running into the limits of a neighboring proprietor; and the line must be that long. We have no doubt but the contracting parties expected this line would be twenty-five *arpens* in length, and designed it to be so. But those expectations have not been realized, because the parties were in error as to the facts. If it had not been intended to fix the point for the line to begin on the upper turn of the bayou, how could it be known at what point below it was to commence, as the line of Fulton was not then known? The counsel reply, (and so the defendants have alleged in their answer,) our line must commence at Fulton's, now Mathews', lower line, and run down until we get twenty-five *arpens*; but this is in direct opposition to the deed, which says, that the line must run up, and not down.

We will now see how the defendants, for a long time, understood this clause in the deed. In the suit which Leonard B. Compton instituted against Mathews, he alleges that he claims according to a plat of survey filed with his petition. It is shown that this plat fixed the lower boundary at the elm tree; and the defendants adhered to it until they were defeated in that suit. They pointed out this tree to surveyors as being the correct point from which to commence running the line; and, after the plaintiffs purchased the land adjoining them, they still admitted this tree to be the proper boundary, but did not give up the land below it. The counsel for the defendants say that these acts and admissions were made through error, but whether of fact or law is not precisely stated. Suppose this to be true, has it not been very clearly shown that Wells was also in error, in supposing Fulton's lower line to be so

near? We think it has, and consider the one error as excusable as the other.

But, say the defendants, if you do not permit us to run our line down the bayou, we shall not get the quantity of land which we purchased. This may be true; but the deed does not say that you are to go down the bayou to get the quantity. It says that you must go back, and that does not mean that you must go in front. But, repeat the counsel, if confined in this way, we must lose the land sold to us. In answer to this, it may be asked, is this the fault of Samuel Levi Wells? When he sold to you, all parties supposed that he had a great depth to his claim. You say yourselves that he had forty *arpens* in depth, when you bought; and if you have lost it since, he is only responsible in warranty. There is a special clause in the conveyance providing for the case of the United States, not recognizing the claim, and it is possible that the warranty may go beyond the stipulation in the act itself, as against the heirs of Samuel Levi Wells; but, upon that point, we express no opinion.

The defendants allege that they purchased a certain quantity of land out of a larger tract belonging to Samuel Levi Wells, and that he, or his heirs, are bound to deliver it to them. It is very true that the defendants agreed to purchase a certain quantity, but they bought with a particular boundary and within certain limits, and they cannot claim beyond them. The case relied on in 6 Mart. N. S. 700, is one in which a certain quantity of land was sold, without boundaries, to be taken out of a larger tract, and it was correctly held that the first purchaser must be satisfied. In this case, the heirs of Samuel Levi Wells are not parties. The plaintiffs do not sue as such, and none of the pleadings call upon them to answer in that capacity. The plaintiffs claim rights purchased from the estate of their father; they may be responsible as his heirs, but they are clearly not responsible as such, until called on in a legal manner.

We will now return to that part of the case, defining what is the first turn in the bayou, below the Biloxi village. The defendants say that their right to consider any part of the bend or turn, as a proper place for their first line to begin, has been decided by this court, in the case of *Compton v. Mathews*, 3 La. 139-145.

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The learned judge who delivered the opinion of the court in that case, says, "the most definite and controlling call in this title, is, at the first turn in the bayou below the Biloxi village. By the plat of survey returned in this cause, it appears the plaintiff has taken for his departure, in running the base line, an elm tree which is at the upper end. The expressions in the title, '*at the first turn in the bayou,*' would be satisfied, either by a location on the lower end, or the upper end of the turn. Were it material in this case to decide the point, it would, perhaps, be correct to say, that a middle point between the upper and lower ends, formed the proper beginning. The plaintiff, it appears, once entertained the idea, that any spot at the turn would satisfy these calls." Again the court say, "this call, we see, was at the first turn in the bayou, below the Beloxi village. Expressions which gave the purchaser the same right to begin at the lower part of that turn, as on the upper."

In relation to this opinion, it is proper to observe that it is merely an *obiter dictum*. It was not necessary to the decision of the case, as was mentioned by the court, and the plaintiffs in this case were not parties to it; and we doubt very much, whether the court would, with the same evidence and reflection that we have given to the subject, again say, that the first turn in the bayou means any portion of the bend or curve. The defendants did, at one time, appear to think, that any part of the turn would satisfy the call of the title; but it appears that they abandoned this idea, and most perseveringly acted on a different one for a number of years; or, to make the most of their conduct, it would seem that they intended to be prepared for any contingency, and, if they could not get the land above, to try to get it below, after having approved a proceeding by which it could not be had in the rear.

To what has been said in previous decisions of this court we always look with much respect, although the reasons assigned may not have been exactly called for; and, in most cases, we concede our own impressions, to preserve uniformity in the decisions of this tribunal. We will, therefore, in this case, go as far in fixing the point of beginning, as the court intimated it would do in the case of *Compton v. Mathews*. That is, we will fix the

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point at the apex, (if the expression be a proper one,) or most projecting part of the curve, at ordinary high water mark in the bayou. This will place the line, according to the plats and evidence, some distance below the elm tree, and entitle the plaintiffs to recover up to it. In doing so, we give the defendants as much land as possible, without directly violating the plain meaning of the expressions used in the sale.

The judgment of the District Court is, therefore, annulled and reversed; and we do further order and decree, that the plaintiffs, Montfort and Thomas J. Wells, do recover of the defendants, John Compton and the legal representatives of Leonard B. Compton, deceased, all the land below a line to commence on the bayou Bœuf, at the point marked by this court, in red ink, S. C., on the plat made by A. G. Phelps, Parish Surveyor, under the order of the District Court; and that a line be drawn from said point to the back line of the claim of Miller and Fulton, as represented by the plat made by A. S. Phelps, United States Deputy Surveyor, approved Oct. 8th, 1837, parallel with the line A. B. on said map of said A. G. Phelps, Parish Surveyor, and at right angles with the base line of Walther's survey, as represented on said Phelps' plat. And the said plaintiffs are quieted in their title to all the land below said line, and the defendants to all above it. The defendants to pay the costs of this appeal, and all those in the District Court up to this time. The line now established, to be run at the expense of both parties. And, as relates to rents, fruits, and improvements, it is ordered that this case be remanded to the District Court, to be proceeded in according to law; and in the mean time no writ of possession to be issued.

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ELIZA HARLIN and Husband v. PIERRE LÉGLISE.

Donations *propter nuptias* were not excepted from the provision of art. 48, tit. 2, book 3, of the Code of 1808, that "no donation *inter vivos* of moveable property or slaves, shall be valid for any other effects than those of which an estimate, signed by the donor or donee, or by those who accept for him, is annexed to the record of the donation." The omission of the estimate, in a donation of slaves, is not cured by the delivery of the slaves.

Donations *propter nuptias* are not excepted from the general rules prescribed by the Code of 1808, in relation to other donations.

APPEAL from the District Court of Avoyelles, *Boyce, J.*

MARTIN, J. The heirs of the defendant* are appellants from a judgment by which the plaintiff Eliza Harlin, has recovered several slaves, which she claims under a donation *propter nuptias*, made by her first husband before marriage, and the hire of them. Her claim was resisted on the ground of the nullity of the donation, resulting from the omission therein of the estimate signed by the parties, which is required by the Code of 1808, art. 48, p. 218. The District Judge was of opinion that this article was not applicable to donations *propter nuptias*, for various reasons; but he mentioned one of them only, to wit, that under the Spanish jurisprudence, these donations were not considered in the "*light of donations of mere liberality, but rather as remuneratory.*" It appears to us that the provisions of the Code† are so express and positive, that it is in vain to resort to the jurisprudence of Spain to fix or ascertain their meaning. The exception of donations *propter nuptias* from the general rule, is repelled by the Code, art. 210, p. 254, which provides, that "*every donation inter vivos, though made by marriage contract, is subject to the general rules prescribed for the donations made under that title.*" This article is found in the eighth chapter, which treats of "donations made by marriage contract to the husband or wife, and to the children to be born of the marriage." In the next chapter, which treats of "donations between married persons, either by marriage contract or during marriage," the provision is repeated in the following

* Pierre Léglise died shortly after the institution of this suit.

† The donation was made in 1820, when the Code of 1808 was still in force.

words : " Every donation of present property made between married persons by marriage contract, &c., is subject to all the rules *above prescribed* for those kinds of donations." Art. 220, p. 256. This article is the second of the ninth chapter, and the "*rules above prescribed*" evidently refer to the rules prescribed in the eighth or preceding chapter. The above are not the only parts of the Code in which the proposition, that donations *propter nuptias* are excepted from the general rules prescribed in relation to other donations, is repelled. In the chapter which treats of the various kinds of matrimonial agreements, it is provided, art. 15, p. 326, that " husband and wife may, by their marriage contract, make reciprocally, or one to the other, or receive from other persons in consideration of their marriage, every kind of donations, *according to the rules, and under the modifications prescribed* in the title of donations *inter vivos* and *mortis causa*." With such direct, express, and repeated provisions, extending to donations *propter nuptias* all the rules prescribed by the Code in regard to other donations, it is in vain to resort to the jurisprudence which prevailed before the promulgation of the Code. We conclude, therefore, that the District Court erred in recognizing any exception from the general rule, in favor of donations *propter nuptias*. The District Court has advanced the opinion, that the omission of the estimate in the donation was cured by the tradition or delivery of the slaves ; this court expressed an opposite opinion in a similar case, to wit, that of *Williams et al. v. Horton, Curator*, 4 Mart. N. S. 468. The reasons for the judgment were given at full length on this point, as well as upon another, which is also raised in the present case, to wit, the inutility of the estimate. It is useless to repeat them here, as a reference to the case will suffice. The plaintiff Eliza Harlin, claims under a compromise with the defendant, a sum of money for the usufruct or hire of the slaves during three years, to which she contends she was entitled. As to this part of the case, it appears to us just to reserve her rights, if any she has. A close examination of this compromise has failed to satisfy us, that it was such a recognition of her title as cured the defect in the donation.

It is, therefore, ordered, that the judgment of the District Court be annulled and reversed, and that there be judgment for the

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defendants, with costs in both courts ; reserving, however, to the plaintiff and appellee Eliza Harlin, her rights to the usufruct or hire of the slaves, under the act of January 30th, 1832.

Brewer, Elgee and Dunbar, for the plaintiffs.

Swayze and D. Seghers, for the appellants.

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8r	196
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ROBERT F. MCGUIRE, for the benefit of the Police Jury of
Ouachita v. HENRY M. BRY and others.

The Police Jury of a parish is a political corporation. It may sue or be sued, and act through agents of its own appointment.

The sureties on a bond given by a sheriff for the collection of the parish taxes, cannot, when sued as sureties for a portion of the taxes collected but not paid over by the sheriff, contest the legality of the ordinances of the Police Jury making the assessment. By receiving the tax roll, and executing the bond, the sheriff and his sureties recognized the authority of the Police Jury. It is too late to contest the validity of their ordinances, after having acted under them, and collected the taxes.

Notice to a principal, that if he do not pay before a certain time suit will be commenced against him, is not such an agreement for indulgence as precludes the party from suing, and thereby discharges the surety.

Separate bonds may be taken from a sheriff for the collection of the state and parish taxes, though one bond would be sufficient.

Bond, in the sum of \$8935, for the collection of the parish taxes, "agreeably to the assessment roll." The taxes for ordinary parochial purposes amounted to \$3573 66, and there was a special tax, of an equal amount, collected for a particular purpose. In an action on the bond: *Held*, that the sureties were bound for both, it being improbable that a bond would be executed for \$8935 to secure the payment of \$3573 66 only.

Where in an action against sureties who are bound jointly only, they claim in their answer the benefit of division, and it is not alleged that either is insolvent, the judgment must be against each for his virile portion.

A prayer for the amendment of a judgment must be made when the answer to the appeal is filed. It will be too late, when the case is fixed for trial.

APPEAL from the District Court of Ouachita, *King, J.*

GARLAND, J. The petitioner alleges that the defendants became the sureties of John Williams, late sheriff of Ouachita, on his bond for \$8935, the condition of which was, that he should faithfully collect, account for, and pay over the taxes levied by the Police Jury of the parish for the year 1836, Williams having been appointed collector for that purpose. The balance of parish

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taxes, which Williams is alleged to have collected, and has not accounted for, it is admitted, amount to \$6,298 30; wherefore a judgment is asked against the defendants.

The defendants excepted, on the grounds: *first*, that B. F. McGuire, who sues as attorney in fact of the parish of Ouachita, is not legally authorized to sue as such; *second*, that the Police Jury has no authority to create the office of attorney in fact for the parish of Ouachita; *third*, that McGuire has never been legally appointed attorney in fact; *fourth*, that the suit is premature, as no judgment has been obtained against the principal, who has property in the parish.

These exceptions were overruled, and the defendants answered by a variety of objections, which proved unavailing. A judgment was rendered against them, and they have appealed.

Of the exceptions filed in the court below, the defendants rely on two here: *first*, that the Police Jury of the parish of Ouachita cannot legally appoint an attorney in fact; *second*, that though the appointment of McGuire be authorized by law, the power given him to institute a suit in his own name as the attorney in fact of the parish, is insufficient.

Upon the first of these points, there can be no doubt. The Police Jury of the parish of Ouachita is a political or civil corporation (Civ. Code, art. 420), created for the purpose of managing the affairs of the parish. It can sue and be sued. Civ. Code, art. 423. 7 Mart. 17. 1 Robinson, 391. Article 429 of the Civil Code authorizes them to appoint the necessary agents and attorneys, whose duties are stated in the acts appointing them. Ib. art. 430. B. & C. Dig. 640-1, sec. 5.

The authority to B. F. McGuire is not a very formal one, but a fair interpretation of it, authorizes him to sue, if necessary; although it appears to us, that a suit in the name of the corporation, would have been more simple and less liable to objection. 1 Robinson, 392.

No question is raised as to the execution and acceptance of the bond, but the defendants rely upon other grounds of defence. They say that the ordinances laying taxes upon the parish of Ouachita for the year 1836, the appointment of assessors, and that of Williams as tax collector, were illegal, not having been

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signed by the President of the Police Jury, and attested by the clerk, and promulgated as directed by law. B. & C. Dig. 643, sec. 18. We are of opinion, as the case is now presented to us, that these are matters with which the defendants have nothing to do. They entered into an obligation that Williams should collect, and faithfully account for, and pay over the parish taxes; and by doing so they recognized the appointment of Williams as valid. It was one of his duties, as sheriff, to collect the taxes, unless the Police Jury had chosen another collector. He gave a receipt for the tax roll, and he and his sureties contracted that he should use due diligence in collecting the sums levied by the Police Jury for the service of the parish. By accepting the tax roll and giving bond, Williams and his sureties recognized the authority of the Police Jury; and it is too late now to contest the validity of their ordinances, after having acted under them, and received the money taken from the pockets of the people, in compliance with their authority. If the defendants had shown that Williams was prevented from collecting the taxes, or that serious obstacles were thrown in his way, in consequence of the irregular proceedings of the Police Jury, there would, probably, be some weight in their arguments; but nothing of the kind is pretended. We have, therefore, a right to presume that he complied with his obligation, so far as the collection of the taxes was involved. He has never paid them over fully, and is proved to have become insolvent. *Police Jury v. Haw et al.* 2 La. 47. It is too late to complain now. *Scarborough v. Stevens and others*, ante, p. 147.

The defendants say they are released from all liability, in consequence of the Police Jury having given a delay to Williams to make payment, without their assent. It appears that on the 4th of September, 1837, the Police Jury, being then in session, passed an ordinance, directing their clerk or treasurer to inform Williams, that if he did not, on or before the first Monday of December, 1837, pay the taxes of 1836, a suit would be commenced against him. This, the defendants contend, was giving a delay for payment, in the meaning of the law. We cannot so understand it. In the case of *Boutte v. Martin et al.*, 16 La. 133, and *Huie v. Bailey*, Ib. 218, and in some other cases, we have had occasion to state the description of delay which will release a surety. This case

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does not come under the rule established. There was nothing in the ordinance, that prevented the Police Jury, or their agent, from suing at any time, or that prevented the defendants from taking any step to secure themselves.

The defendants further contend, that there is no law directing the taking a separate bond, to insure the collection of the parish taxes by the sheriff. We will not deny that, if a sheriff were to include in one bond, an obligation to collect both the state and parish taxes, it would be legal; but if the parties choose to separate them, we are unable to see how that releases them from responsibility. The execution of two bonds, one for the state and the other for the parish taxes, is, in our opinion, a convenient and safe course, and conformable to law. There is certainly no law prohibiting the execution of a bond for each purpose. B. & C. Dig. 731, sec. 21; p. 777-8, sec. 3, 4, 6, 8.

The defendants further contend that the judgment is erroneous, in condemning them to pay more than the amount of the taxes, as appears by the assessment roll. The state rolls, as appear by that document, amount to \$357,166, and that amount, the sureties allege, is the extent of their liability. It appears from the ordinances of the Police Jury, that, in 1836, they directed a tax for ordinary parochial purposes to be collected equal to the state tax, and they further ordained that a special tax of one hundred per cent on the state tax, should be levied for the purpose of building a jail, and fire proof offices for the judge of the parish and the clerk of the court. This latter tax the defendants say they never contracted that their principal should collect. The bond recites, that Williams has been appointed by the Police Jury, collector of the parish taxes, and it is given to secure the faithful performance of his duty, "and if he shall collect the said taxes agreeably to the assessment roll thereof," then the penalty to be void, &c. The defendants wish to give a literal meaning to this expression, and to confine the amount of taxes to the sum mentioned on the roll for state taxes. This we think is not a fair interpretation. We are of opinion that it should be taken in reference to the taxes assessed by the Police Jury. That body used the state tax roll for the purpose of fixing the quantum of their own taxes, and *quoad hoc* made it their own. It is hardly

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to be believed that the sheriff, and his sureties, executed a bond for \$5935, for the purpose of securing the collection of \$3573 66. We think they are bound for the whole amount of the taxes.

The defendants further allege, that there is error in the judgment in condemning them to pay the whole sum claimed, whereas they are only jointly bound, and claimed in their answer the benefit of division. The judgment allows the plea of division, but condemns the parties altogether to pay the whole sum. This we think erroneous. It is not alleged or proved that any of the parties are insolvent, and by the articles 3018, 3019 of the Civ. Code, it is shown that the defendants are only responsible for their virile portion, being joint sureties. To correct this error, it will be necessary to reverse the judgment. The error was the result of an oversight in drawing up the judgment, and from not having the sureties bound, *in solido*, as they should be in all obligations of this kind.

The demand of the plaintiff to amend the judgment, and allow interest, cannot be acceded to. It is a well settled rule in this court, that such applications must be made when the answer to the appeal is filed. It is too late when the cause is called for trial.

The judgment of the District Court, is, therefore, annulled and reversed; and it is ordered that the plaintiff, for the use of the Police Jury of the parish of Ouachita, do recover of Henry M. Bry, the sum of \$2332 77; of Ephraim K. Wilson, the like sum of \$2332 77; and of Alexander D. Peck, the like sum of \$2332 77; with costs in the District Court, for which all the defendants are bound, *in solido*. The costs of the appeal to be paid by the appellee.

McGuire, propria persona.

Garrett, for the appellants.

JAMES M. REYNOLDS and others v. JANE ROWLEY and others.

An exception to the jurisdiction of the court, waived below, cannot be revived in the appellate court.

A power of attorney admitted to record in another State, is not "a record or judicial proceeding of any court," within the meaning of the act of Congress of twenty-sixth May, 1790. A copy of such an instrument, must be certified in the manner required by the act of twenty-seventh of March, 1804.

The declarations of one who had acted as an agent, made after the termination of his agency, are not binding on the principal, though the former be dead at the time of the trial.

An attorney cannot object, on the ground of professional confidence, to being interrogated as to the manner in which he became possessed of papers introduced by him in support of his client's cause, where it does not appear that he received them from his client or his agent.

A party to a suit, interrogated as to a particular fact, cannot, under the pretext of answering the interrogatory, annex to his answer letters of a third person, and thus introduce in evidence statements not under oath, for the purpose of influencing the jury on other points in the case.

The joint owners of a plantation are liable, each for his virile share, for supplies furnished for its use.

Though the powers of attorney given to the manager of an estate by the joint proprietors, may have been revoked by the death of one, and the marriage of another, yet if he continue to act as such, for the benefit of the joint owners, without any express disavowal of his authority, or if he be subsequently recognized as such, either tacitly or expressly, the proprietors will be bound by his acts.

APPEAL from the District Court of Concordia, *Curry, J.*

GARLAND, J. The plaintiffs are factors in the town of Natchez, and represent that they acted as such, and did business for the defendants, who were the owners of a plantation called Marengo, in the parish of Concordia. They represent that, in the month of January, 1832, the defendants Jane Rowley, then Girault, and Frances E. Sprague gave a power of attorney to Sturges Sprague, the husband of the latter, constituting him their general agent, to conduct and manage the affairs of said plantation, with the power to buy and sell, mortgage and pledge, sign notes, and draw bills, &c.; and that, in the month of February in the same year, the late James Kempe gave a similar power of attorney to said Sprague, under which he went on to do business with the plaintiffs, drawing bills on them, procuring their endorsements, obtaining advances in cash and supplies, and other things for the use of the said planta-

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tion, and paying the debts of the parties, until the fifteenth of June, 1835, when a balance of upwards of \$36,000 was due to them, which, with interest, amounted in about one year after, to more than \$39,000, when an account was presented to Sturges Sprague, and admitted by him to be correct, so far as he could form an opinion without examining the vouchers. This sum, with the interest at eight per cent per annum, is now claimed by the plaintiffs. They file with their petition, accounts in detail of all their transactions with Sprague as agent, and papers alleged to be copies of the powers of attorney given to him by the parties.

The defendants answer separately, and put at issue a variety of questions.

The heirs of James Kempe except to the jurisdiction of the District Court, and say they can only be sued in the Court of Probates, being minors and represented by their mother and tutrix. They also deny that their father ever gave a power of attorney to Sprague, and allege, if he did, that the authority was exceeded, and the agency continued after his death in the winter of 1834-5, without authority from them. They set up other defences, which it may be necessary to notice hereafter. Jane Rowley answers, that she gave a power of attorney to Sprague, but, that it had been exceeded with the knowledge of the plaintiffs, and that it was revoked by her marriage in April, 1834, after which, the plaintiffs, with a full knowledge of the facts, continued to deal with Sprague, and greatly increased the amount of the account against the Marengo plantation.

The District Court maintained its jurisdiction, and gave a judgment against Jane Rowley for \$12,225 77, with interest at eight per cent, from the fifteenth of June, 1835, and against the heirs of James Kempe for \$4451 23, with like interest, and in favor of Frances E. Sprague, it being shown that her portion of the debt had been paid in full; from which judgment the defendants who were condemned, have appealed, and the case is before us as between them and the plaintiffs, neither party having cited Frances E. Sprague, or made her a party to the appeal. No motion has been made to dismiss the appeal on that account; and we have to take the case as it is presented to us, leaving the consequences to the parties.

The exception to the jurisdiction, seems not to have been de-

cided upon in the District Court. We presume, therefore, that it was waived, as the heirs of Kempe went to trial on the merits, without insisting on it. They cannot revive it in this court.

On the trial of the case, the plaintiffs offered in evidence a copy of a document purporting to be a power of attorney from James Kempe to Sturges Sprague. It is an act under private signature. The counsel for the heirs objected to it, on the ground of there being no proof of its being the act of James Kempe, because the justices of the peace had no authority, by the laws of Kentucky, to take such an acknowledgment. There was no evidence of the hand writing of Kempe, nor of that of the justices; and, generally, it was not properly authenticated. The instrument purports to have been executed in Mason county, Kentucky. The maker, it states, took it before two persons calling themselves justices of the peace, and acknowledged it to be his act and deed. The clerk of the County Court certifies that these persons are justices, and the presiding justice certifies to the official character of the clerk. On the faith of these certificates, the instrument was recorded in Adams county, Mississippi, and a copy, certified to have been taken from the original on record in the office of the Clerk of Probates of that county, was offered, without any evidence that the person certifying as clerk was really so. The judge erred in permitting this document to go to the jury. It was not certified in the manner required by the act of Congress of March twenty-seventh, 1804 (Ingersol's Digest, 77. 3 Laws U. S. 621); and the act of May twenty-sixth, 1790, (2 Laws, U. S. 102,) does not apply to such a document. In 4 Mart. N. S. 355, it was held that an instrument acknowledged and certified as this has been, is neither a record nor a judicial proceeding. 4 Mart. N. S. 200. 6 Ib. N. S. 622.

The plaintiffs also offered in evidence a document marked A., annexed to the petition, purporting to be a statement of their account against the Marengo plantation, with a statement of S. Sprague as to its correctness. The counsel for the defendants objected: *first*, that it does not purport to be signed by Sprague, as agent; *second*, that it bears date subsequent to the death of James Kempe, and two years after the marriage of Jane Rowley, when, it is alleged, that all the powers that Sprague ever possessed

had ceased, and after the sale of the Marengo plantation, when no admissions made by Sprague could bind the defendants, except on oath as a witness. The judge overruled the objections, and permitted the document to go to the jury. We think that he erred. There can be no doubt that, at the time when this document was dated, Sprague was no longer the agent of the parties. Laying out of view the effect which the death of James Kempe, and the marriage of Jane Girault with C. N. Rowley, may have had on the contract of agency, the Marengo plantation had been sold nearly a year, which, beyond all doubt, terminated the agency. Sprague had then no authority to bind the parties by any declarations of his, although it appeared that he was dead at the time of the trial. As to the effect which the declarations or written acknowledgments of Sprague, during the existence of his agency, might have, it is not now necessary to decide; but any acknowledgment of a debt, after his power had ceased, was not binding on the defendants. 2 Starkie, 23, 24.

J. M. Elam, the counsel for the plaintiffs, was sworn as a witness, and being asked by the counsel for Jane Rowley, where and from whom he got the vouchers which had been given him, and which were then being used in support of the plaintiffs' claim, declined answering the question, on the ground that he knew nothing but what had been communicated to him in professional confidence, and the court sanctioned his refusal. To this the defendants excepted. As the point is presented by the record, we think that the judge erred. It is shown that Elam did not receive the papers from Marshall, the resident partner of the house in Natchez; nor from Lacoste, the agent; nor does it appear that he got them from Ilsley, the general agent of the plaintiffs. If, therefore, he did not get them from the plaintiffs, nor from their agents, we are unable to see what professional confidence can be violated. The plaintiffs maintain that the documents are their property. Lacoste states that he gave them to Sprague for examination; and from his statements, it would appear that they were not returned. It is certain that the papers were for a long time in the possession of the husband of Jane Rowley, and of the counsel who defended the first suit; how they got again into the possession of the counsel for the plaintiffs, does not appear. The name of the person

from whom the documents were obtained, cannot, we suppose, be a professional secret. We do not see that it is a matter of much consequence to the decision of the case, but we think the question should have been answered.

We are also of opinion that the judge erred, in permitting the letters of Remsen & Co., of New York, attached to Marshall's answer to interrogatories, to be read to the jury. Under the pretext of stating the time when he was informed of the marriage of Jane Girault with Rowley, he had no right to attach the statements of Remsen & Co., not made under oath, to his answers, and thus get them before the jury, to produce an impression that Rowley and his wife had recognized Sprague's authority subsequently to their marriage.

As to the charge of the judge to the jury, we are of opinion that it is correct;* but with the verdict of the jury we are not entirely satisfied. It does not appear to us that the sums alleged to have been paid in New York to Jane Girault and Thomas B. Kempe, have been sufficiently established; nor are those alleged to have been paid in New Orleans by Reynolds, Byrne & Co. There are other items in the account that require a more satisfactory explanation; and, as at present advised, we are not satisfied of the legality of the claim for interest at the rate of eight per cent per annum, from the 15th of June, 1835. We think justice requires that the case should be remanded for a new trial.

The judgment of the District Court is, therefore, annulled and reversed, and the cause remanded for a new trial, with instructions to the District Judge not to admit as evidence, the document marked D. D. D., purporting to be a copy of a power of attorney from James Kempe to Sturges Sprague, in its present form; also, not to admit the declaration or acknowledgment of S. Sprague to the document A., as evidence; nor to permit the letters of P. Remsen & Co. to be read to the jury; and further, to permit the

* The judge charged, that the defendants were liable as joint owners, for their virile shares; and that, though by the death of one of the defendants and the marriage of another, any special power of attorney to Sprague, as manager of the plantation, would be revoked, yet, if he continued to act as such, for the benefit of all the co-proprietors, without any disavowal of his authority, or if recognized, either tacitly or expressly, as such by the defendants, that they would be bound by his acts.

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witness Elam to be interrogated as to the name of the person from whom he received the vouchers in question, and for what purpose they were entrusted to him, unless they were received from the plaintiffs, or their agents, or from some other person for the purpose of being used in defending or prosecuting the rights of such person; and, in other respects, to proceed according to law; the appellees paying the costs of the appeal.

Elam, for the plaintiffs.

A. N. Ogden and Sanders, for the appellants.

ISAAC THOMAS and others v. WILLIAM HENRY TURNLEY.

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Proof of the signature of the grantor, and of that of one of the subscribing witnesses residing in another State, is sufficient evidence of the execution of a deed *sous seign privé*.

Plaintiff offered in evidence copies of deeds taken from the records of the office of the Parish Judge, on making oath that he had inquired in vain, from all persons who were likely to have any knowledge of the matter, for the originals, which he believed had been lost or destroyed. It was shown that the deeds were more than thirty years old; that the Record of Conveyances had been regularly kept; that it was formerly the practice to give back the originals after they were recorded; and that the Parish Judge and subscribing witnesses were dead. Other circumstances tended to show that the deeds were genuine. *Held*, that the copies were properly admitted.

In controversies between the original grantee of a tract of land, or those claiming directly under him, and one in whose favor, as assignee, the title has been confirmed by the Commissioners of the United States, the certificate in favor of the latter, and the facts recited in it, will not be evidence, but the confirmation will enure to the benefit of the party having the inchoate title. Otherwise, as to third persons showing no title. The Commissioners appointed to decide upon land titles emanating from the former sovereigns of Louisiana, being authorized, by different acts of Congress, to confirm inchoate titles existing at the time of the change of government, in favor of certain grantees, or *their legal representatives*, had authority, *incidentally*, to decide whether one who claimed, not as the original grantee, was entitled to a confirmation; and such confirmation, in favor of an assignee, has been uniformly regarded as entitling the latter to a patent. It is evidence against the government, and though not binding on the original grantee, or those claiming under him, is *prima facie* evidence against the rest of the world.

A petitory action may be maintained against a naked possessor, upon a title which, if accompanied by possession, would be regarded as a just title.

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A petitory action may be defeated, by showing that the title is in a third person, or that the latter has a better title than the plaintiff.

Jurors are so far the judges of the law as well as of the facts, that they have a right, in all cases, to find a general verdict. But the court, if not satisfied therewith, may grant a new trial.

APPEAL from the District Court of Catahoula, *Boice, J.*

McGuire, for the plaintiffs.

Brent and Dunbar, for the appellant.

BULLARD, J. The plaintiffs represent that they are the legal and rightful owners of a tract of land fronting on Black river, having Little river or Catahoula bayou for its upper side line, and containing one thousand acres. That they claim said land in virtue of a confirmation by the United States to Charles Miles in 1812, and a chain of mesne conveyances from those under whom they hold, of record in the parish of Catahoula, beginning as far back as 1809. They further state that they, and those under whom they claim, have had the peaceable and uninterrupted possession of said tract, under just titles, translativ of property, for more than thirty years; and have, for the whole or a greater part of the time, made the regular payment of taxes thereon, which confers on them title by the prescriptions of ten, twenty, and thirty years. They further allege that, in the year 1837, the defendant Turnley wrongfully and illegally took possession, and that on the 28th of January, 1837, the petitioners sued the said Turnley for the recovery of said tract of land, which suit was continued from time to time until the fall term, 1840, when the plaintiffs took a nonsuit. They ask for judgment against Turnley for the land, and for damages.

The first answer of the defendant was a general denial of the plaintiffs' title. In an amended answer, he avers that he is owner of the land claimed by the plaintiffs, by virtue of a deed of conveyance from John Hébrard, Eugenie Roberts, and Bennet Roberts, the heirs and legal representatives of John Hébrard, deceased, from whom they derive title, dated June 8th, 1835. He further pleads prescription, and claims \$5000 for improvements put upon the land.

There was a verdict in favor of the plaintiffs for the land, and allowing to the defendant \$2700 for his improvements; and the defendant has appealed from the judgment rendered thereon. The

appellees pray a reversal of the judgment allowing the claim for improvements. The plaintiffs gave in evidence, in support of their title, Commissioners' certificate (B) No. 1754, showing a confirmation, in favor of Charles Miles, of his claim to "a tract of land containing about 1181 $\frac{1}{2}$ arpens, equal to 1000 American acres, founded on an uninterrupted occupancy and cultivation by John Hébrard, and others claiming under him, for more than seventeen consecutive years previous to the 20th day of December, 1803, being one moiety of the entire tract, the other half being confirmed to John Henry; the whole claimed under an order of survey for forty arpens front, by the depth of forty, on both sides of Little river, bearing date the 22d day of March, 1786, under the signature of Estevan Miro, the Governor of the Province of Louisiana; the authenticity of which order of survey being questionable, the claim is confirmed for a less quantity of land on proof of occupancy as above stated, and the part hereby confirmed to the said Charles Miles having a front of thirty arpens on the right bank of Black river, descending said river from its junction with Little river, sometimes called Catahoula bayou, to a point at the termination of said thirty arpens, whence a line nearly parallel with the general course of Little river, from its mouth up, shall be extended so far as that the quantity of one thousand acres will be included, by running the back line nearly parallel with the general course of Black river, until it shall intersect Little river, and thence down the right bank of Little river, as it meanders, to the beginning."

The plaintiffs further gave in evidence a plat of survey made by order of the Surveyor General, and approved by him, which shows a location of the confirmed claim of Miles, conformable to the calls of the certificate of confirmation.

Charles Miles, in whose favor this tract of land was confirmed, conveyed it to the plaintiffs, or those whom they represent. That deed appears to us sufficiently proved. A witness testified that he was acquainted with Miles, and that he knows his signature, *having seen him write*, and possibly received letters from him, and that the signature to the deed and Commissioner's certificate is his. It is contended that this is insufficient, because the witness does not say that he had seen Miles *write his name*, and because he

does not state how he knows the signature to be genuine. The opposite party might have inquired, on the cross-examination, what were the witness' means of knowing that the signature was genuine. This he has not chosen to do, and we consider his testimony, coupled with proof of the hand-writing of Pope, one of the subscribing witnesses residing in Kentucky, as sufficient to prove the deed under private signature; and that it was properly permitted to go to the jury.

Miles appears to have claimed the land, before the Commissioners, as assignee, and in the right of John Hébrard, and those claiming under him, in virtue of their occupancy and cultivation for many years before the change of government, the other half of the tract being confirmed to John Henry; and at this point in the cause a difficulty arose as to the proof of any such assignment or conveyance. It is certain that the Commissioners regarded Miles as assignee, and it is asserted that Hébrard sold to Henry, and Henry to Miles. The principal controversy relates to these two links in the plaintiffs' title.

Two documents were produced, purporting to be copies from the Record of Deeds in the office of the Parish Judge of the parish of Catahoula, of a deed from John Hébrard to John Henry, selling and conveying all that valuable tract of land on the Black river and the bayou Catahoula, containing about three thousand acres or *arpens*, and bearing date August, 1807, more than thirty-five years ago; and another from Henry to Miles for the same land. It was contended that the originals were not sufficiently accounted for, nor their genuineness established.

Thomas, one of the plaintiffs, laid a ground for the introduction of these copies of acts under private signature from the records of the parish, by making oath that he had made diligent inquiry and search for the original deeds of conveyance, one from John Hébrard to John Henry, and the other from Henry to Miles, and both of record in the Parish Judge's office, from all persons, and at all places where he had any reason to suppose they might be found, if in existence, but without being able to gain any information in relation to them, from which he has just reason to believe that they have been lost or destroyed; that he is convinced that neither Miles, nor any of the plaintiffs, have any knowledge

of them, but believes that they were lost or destroyed in the Land Office at Opelousas, where he has just reason to believe they were placed by Miles, both from his own information and from other circumstances.

In further support of the deeds, it is shown, that Hébrard instituted a suit against Henry to recover the price of the land, and alleged a sale from himself to Henry, and that he recovered a judgment. It is further shown, to have been formerly the practice to give back originals, after recording or copying them into the records of the Parish Judge's office, and that the record books containing these deeds are regularly kept, and still exist in the office. It is also shown, that the three persons who purport to have signed as subscribing witnesses are dead, as well as the judge of the parish in office at that period. The deposition of the present Register of the Land Office at Opelousas, was also produced, to show that search had been made in his office for the deeds, without success.

The antiquity of these instruments, together with all the other circumstances shown in evidence, such as the death of all the parties and witnesses, the admission of Hébrard in a judicial proceeding, especially when that proceeding is the basis of the title under which the defendant claims to hold the land through a sheriff's sale to Bowie, a relinquishment by Bowie and the heirs of Hébrard, and the sale by those heirs to Turnley, and the fact that the Commissioners recognized Miles as the assignee, satisfy us that the deeds were genuine, and the copies properly admitted. There is nothing to create the slightest suspicion ; and possession seems to have accompanied the deed to Henry, for it is stated by the Commissioners that a part of the land had been confirmed to him.

The deed from Henry to Miles purports to convey a tract of land described as follows : " Beginning at a large sweet gum on the bank of Black river, *at the lower end of a survey containing 1600 French acres*, which he purchased of John Hébrard, and running thence north-eastwardly, with the meanders of the river, the distance of 346 poles, for a front line, to a sasafras and pecan on the bank of said river ; and said front line is found to be the course of N. 20 E., thence at right-angles N. 20 W. from each

end of the above front line 465 poles, which is intended to include a survey of 400 superficial *arpens* which said Henry conveyed to James Wallace, the said Wallace having recently transferred the said 400 *arpens* to the above named Charles Miles. The above described lines are to contain 1000 acres, more or less."

This sale does not embrace the land at the confluence of the Black and Little rivers, where the defendant's house is represented to stand. It commences forty *arpens* below that point, and the front is thence up the river 346 poles, and the side lines about forty *arpens* in length. It is clear, then, that the location, by the surveying department, deviates from the description of the land in the act of sale from Henry to Miles; and that the confirmation by the Commissioners in favor of Miles, was not confined to the land embraced in the deed from Henry, but gave him thirty *arpens* front on the right bank of Black river, descending the river from its junction with Little river.

It appears, therefore, that, although Miles was recognized by the Commissioners as the assignee of those whose settlement right was confirmed, (for it must not be forgotten that Hébrard's order of survey was repudiated by them as spurious,) the plaintiffs have not shown, by other evidence than the certificate itself, that they owned that part of the tract immediately at the junction of the Black and Little rivers. And the question here occurs, how far that recognition by the Commissioners furnishes evidence of title in Miles, so far as the defendant is concerned; and how far he may require the plaintiffs to supply that link in their chain of title?

Hébrard had sold all his pretensions to Henry, and consequently the confirmation to Miles, as assignee, could not enure to the benefit of the former, the original grantee. The title set up by the defendant, under the heirs of Hébrard, is not fortified by this circumstance.

But the defendant gave in evidence, to show an outstanding title to a part of the *locus in quo*, an act of sale from Henry to one York, to whose benefit it is contended the confirmation must have enured. This deed bears date Dec. 2, 1809, and purports to convey to York all the land on the east side of the river which Henry had purchased of Hébrard, and "on the west, beginning

Thomas and others v. Turnley.

at the mouth of the Ouachita and running fifteen acres down, crossing the Catahoula bayou, and running forty acres back, including the ferry," &c.

It is contended that, there being no evidence of any assignment or transfer from York to Miles, the confirmation confers no title upon the latter, so far as an outstanding title in York is shown, and that, consequently, he cannot recover that part of the premises.

In the case of *Sanchez and wife v. Gonzales*, 11 Mart. 207, this court held "that the appellant could not be bettered in relation to his title by the certificate of confirmation of the Land Commissioners of the United States, even if admitted to make a part of the facts in the cause: *first*, because the certificate gives no right against individual claims; and *secondly*, because, &c." The same idea is expressed, in other cases, by saying that the Commissioners' certificates generally amount to no more than a relinquishment on the part of the government. In the case of *Sacket v. Hooper*, (3 La. 107,) the plaintiff claimed under a sale from the original grantee, and the confirmation relied on by the defendant was in favor of an assignee, and it was held that the recital in the certificate did not show title as to the supposed assignor. The court said, "the certificate confirms the claim in Wiley, on an allegation of a sale from McLaughlin; but unless the sale be established, the confirmation enures to the benefit of the person having the inchoate title, as settled by several decisions of this court." 8 Mart. N. S. 331.

It is believed that, in all the cases in which this principle has been recognized by this court, the question arose between the original grantee, or one claiming directly from him, and the person in whose favor the title had been confirmed as assignee. To that extent, nothing can be more clear or better settled. And if the representatives or vendee of York were now suing Miles for the land at the junction of the Ouachita and Little rivers, the certificate in favor of the latter, as assignee, would not make proof against him, and Miles could not make out his title without proving the assignment recited in the certificate. On the contrary, the court held, in the case of *Boatner v. Ventress*, (8 Mart. N. S.

657,) that a recital in a patent or certificate of confirmation binds persons showing no title, and is good evidence against them.

The Commissioners appointed to decide upon land titles emanating from the former sovereigns of the province of Louisiana, acted under various laws of Congress, which authorized them to confirm, in favor of certain grantees, or *their legal representatives*, inchoate titles existing at the change of government. They, therefore, had authority, *incidentally*, to decide whether the claimant, who was not himself the original grantee, showed himself entitled to a confirmation; and such confirmations in favor of an assignee, has uniformly, it is believed, been regarded as entitling the assignee to a patent. It is evidence against the government; and although the grantee or settler cannot be concluded by it, we see no good reason why it should not be at least *prima facie* evidence against the rest of the world. In the case now before us, York, and any person claiming to hold under him, would not be bound by the recital in the certificate; but if the decision of the Board in favor of Miles authorized the issuing of a patent, why should a third person avail himself of the absence of proof of an assignment, when York, or his representatives, remain silent? Against any person except York, or his representatives, we think the recognition in the certificate furnishes *prima facie* evidence. If Miles were in possession under that title, we cannot doubt but that it would be a sufficient basis for the ten years' prescription; and we held, in the case of *Bedford v. Urqhart*, (8 La. 241,) that a petitory action can be maintained against a naked possessor, upon a title which, if accompanied by possession, would be regarded as a just title.

But it is contended, on the part of the defendant, that, even without setting up any title, he has a right to show an outstanding title, to defeat the action of the plaintiffs, and that the deed to York shows such outstanding title, and presents an insuperable barrier to the plaintiffs' recovery, unless they prove the assignment.

It is true that the plaintiffs must show title in themselves, and it follows that the defendant may defeat their action by showing that the title, which the plaintiffs pretend to own, belongs to another, and that another has a better title. But having

expressed an opinion that the recital in the certificate is *prima facie* evidence in favor of the assignee, we cannot consider the deed to York, *per se*, as evidence of such an outstanding title. The title thus shown must be a legal, subsisting, and a better title than the plaintiffs'. 4 Wash. C. C. R. 171.

The title exhibited by the defendant is clearly a *non domino*. Hébrard, under whose heirs he claims, had sold to Henry, and Henry had sold to Miles and York. At the time of the judgment of Hébrard against Henry, and of the sheriff's sale, Henry had no title, and Bowie acquired none by the sheriff's deed. But, further, Hébrard was the warrantor of Henry, and his heirs never could set up title against his vendee. They are estopped and precluded by the exception of warranty.

This brings us to consider certain bills of exception, taken during the progress of the trial in the District Court.

The defendant prayed the court to charge the jury, that, if they believed from the evidence that Henry, when he made his sale to Miles, had no interest or title to or in the land now in possession of Turnley, he could convey none to Miles, and that the plaintiffs could not recover without title. The judge, however, told the jury, that if Henry had no right to the land then, he could not convey any; but if he had had land, and had sold part or all to another person previously, the sale to Miles would be a title translatif of property, and the only person who could take the land from him would be the former vendee of Henry.

In substance the charge was such as was asked, as to the want of title in Henry when he sold to Miles; and, if we understand the import of the whole charge, it was not calculated to mislead the jury to the prejudice of the defendant. The idea which the judge intended to convey, probably was, substantially, what we have above expressed, that York, or his representatives alone, could recover the land from Miles. The most material part of the charge prayed for was given, to wit, that the plaintiffs could not recover without title.

Another bill of exceptions shows that the defendant prayed the court to instruct the jury, that they were the judges of the law and facts. The judge refused to do so in those words, but told them that they were to judge of the facts and the evidence, and should

be governed in their construction of the law by the opinion of the court; that the court was to give them the doctrine of the law applicable to the case; that it was supposed they would be guided by its views; and that they were to judge, exclusively, what facts were proved, and how far the principles of law were applicable, and to draw a conclusion from the law and facts in their verdict; and that in this sense they *were* judges of the law and the facts. This charge might have been more clear, perhaps, by telling the jury that they had a right, in all cases, to find a general verdict; and that the court could grant a new trial if not satisfied with their finding; but the explanation given by the judge was not such as to prevent their doing justice between the parties, as they understood the law and the facts.

The testimony of King was properly admitted; and the payment of taxes was sufficiently proved. Nothing shows that any better evidence was in the power of the party.*

The appellees have prayed that the judgment may be amended in their favor, the jury having given too much for improvements; and because the defendant, being in possession without title, and consequently in bad faith, was not entitled to recover for his improvements.

The jury thought, from the evidence, that the value of the land was enhanced \$2700 by the buildings and clearing; and we are not satisfied that justice requires that we should disturb their verdict.

Judgment affirmed.

* King, who was examined under a commission, testified that, as the agent of Miles, he had paid the taxes. His testimony was objected to, on the ground stated in the bill of exceptions, "that his answer referred to an old account against Miles, which referred to tax receipts marked by letters, which receipts, if in existence, were the best evidence; and that, not having been proved to have been lost, nor in any manner accounted for, no inferior evidence could be received."

Succession of Hugh B. Johnson—Kennedy and another, Appellants.

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3r 216
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SUCCESSION OF HUGH B. JOHNSON—WILLIAM KENNEDY and another, Appellants.

One who has ceased to act as overseer, but continues his services as an agent for the owners of a plantation, has no privilege on the crop for his services in the latter capacity.

An overseer whose services have continued for one year and for a part of a second, has, under art. 3184 of the Civil Code, § 1, a privilege on the crops of both years, or on either, for the whole amount due him. His privilege on the crop of the past year, may be exercised upon its proceeds, even after it has been sold; but as to the growing crop, his privilege is confined to the crop itself.

The holders of notes given for the price of a tract of land, though not identified with the sale by the *paraph* of a notary, will be entitled to a privilege on the thing sold. The *paraph* of the notary is not the only means by which the notes may be identified. Their identity may be proved by his oath.

APPEAL from the Court of Probates of Catahoula, *Taliaferro, J.*

BULLARD, J. The curator of the vacant estate of Hugh B. Johnson having presented his tableau, or statement of the debts due by the estate, showing the order in which he proposed to classify them, sundry oppositions were filed, two of which only need now be noticed, to wit, those which relate to W. Kennedy and Louisa Harper, they alone having appealed from the judgment of the Court of Probates amending the tableau.

I. William Kennedy was the overseer on the plantation of the deceased for the year 1839, and for a part of 1840, and his claim as such, and as agent subsequently, was put down on the statement or tableau as privileged upon the crop of 1840. The Judge of the Court of Probates was of opinion that he was entitled to a privilege on the crop of 1840, only for his wages as overseer for a part of that year, amounting to \$219; that for his services as agent a few months longer, during the same year, amounting to \$306, and for his wages for the year 1839, amounting to \$700, he was to be classed as an ordinary creditor.

We concur with the Probate Judge in the opinion that the salary of Kennedy as agent, after he ceased to be overseer, is not privileged upon the crop. But we think that for his wages in that capacity for 1839, and a part of 1840, he has a privilege on the crops of both years for the whole amount. Art. 3184 of the Civil Code, is in the following words: "The debts which are pri-

vileged on certain moveables are the following : I. The appointments or salaries of the overseer for the year last past, and so much as is due for the current year, on the product of the last crop, and the crop at present in the ground." &c. This article supposes a continuity of service, and the privilege is not confined to the crop itself of the past year, but extends to the product of it. In relation to the growing crop, the expression is different. The privilege as to the last year's crop may be exercised, it would seem, upon the proceeds, after the crop has been sent to market and sold. The two clauses of the sentence are connected by a copulative conjunction, and give, we think, a privilege to the overseer upon both crops, or either, for the whole of his wages for the past and current year.

II. The other appellant, Louisa Harper, complains that Painter and Williams were set down on the tableau as entitled to the vendor's privilege, for two claims, the one for \$6034, and another for \$4034, evidenced by two notes given by the deceased ; and that Tew and Dosson are allowed to stand as privileged creditors, although they are not so. She represents that she is herself the holder of a note of Johnson's, and is classed as having the vendor's privilege and a mortgage for \$9034.

The two notes held by Painter and Williams are produced and identified with the sale of the plantation and slaves from Lope to Johnson ; not by the *paraph* of the notary, it is true, but by his oath. They are for the same amounts, of the same date, and payable at the same periods, to the order of the vendor. The act of sale recites that, "the said Johnson has executed two promissory notes, dated 4th March, 1839, and payable, one on the 4th March, 1840, for \$4034, the other payable on the 4th March, 1841, for the sum of \$6034, which *said notes are secured by personal security.*"

It is argued that these expressions in the deed, coupled with the fact that personal security was given, and that, with respect to the other notes given for the price, payable afterwards, a mortgage was expressly reserved, show that the parties did not intend that the notes in question should be secured also by the vendor's privilege ; that they do not bear the *ne varietur* of the notary as the others given for the rest of the price do ; that the names even

Succession of Hugh B Johnson—Kennedy and another, Appellants.

of the sureties are not given ; and that there is strong reason to believe that the vendor credited the sureties and waived his privilege as vendor.

To this it may be said, that the *paraph* of the notary on notes is not exclusive evidence of their identity, and that the vendor has a privilege on the thing sold, when it appears by the deed that the sale was on credit. The case of *Howard v. Thomas* was a stronger one than the present. In that case the court held that, although it was *agreed* that the act of sale should contain no special mortgage, and that the price should be given in drafts, "which when paid shall be in full," &c., the vendor had a right, upon non-payment of the drafts, to revert to his original contract, and seize the property upon his privilege of vendor. 3 La. 112.

We freely admit that such a practice is calculated to mislead, and may be productive of frauds ; and that persons taking notes, regularly identified by a notary, and seeing, on recurring to the act, that they were given for the price of an immoveable and secured by special mortgage, while other notes given for the same purpose are expressly declared to be secured by personal security, and no mortgage reserved, might fairly conclude that their own notes alone were secured either by a mortgage or privilege on the immoveables. If it were *res nova* we should hesitate to pronounce that, as to *third persons*, the vendor, under such circumstances, still retains his privilege. But the vendor's privilege is of a character so sacred, that in cases of doubt it ought, perhaps, to be maintained ; and the court has already settled the question arising in this case in several previous ones, particularly in that above referred to, and in that of *Moore, Adm'r, v. Louaillier et al.* 2 La. 575.

It is, therefore ordered and decreed, that the judgment of the Court of Probates be affirmed, as to all matters except the privilege of W. Kennedy ; that in relation to his claim it be reversed ; and that the statement of debts be so amended, as to place the said Kennedy as a privileged creditor on the crop of 1840 for his wages as overseer for the years 1839 and 1840, to wit, the sum of nine hundred and nineteen dollars, and as a simple creditor for the balance of his demand ; that the statement of the debts as thus

Blackstone v. His Creditors.

amended, be homologated ; and that the costs of the appeal be paid out of the estate.

Purvis, for the appellants.

Garrett, contra.

PLEASANT M. BLACKSTONE v. HIS CREDITORS.

In contests between the creditors of an insolvent, the confessions or acknowledgments of the latter are not evidence. Such declarations are presumed to be fraudulent.

Where the vendors of slaves have left them for a number of years in the possession of the vendee, without taking any steps to preserve their privilege, they cannot assert it to the prejudice of creditors who have obtained judgments against him, or received special mortgages from him. C. C. 3238.

APPEAL from the District Court of Catahoula, *Willson*, J.

Mayo, for the insolvent.

McGuire, for the appellants.

MORPHY, J. Lancaster, Denby & Co., and S. W. Oakey & Co., creditors of the insolvent, have appealed from a judgment dismissing their opposition to the tableau of distribution filed by the syndic. They claimed under article 722 of the Code of Practice, a privilege upon certain immoveable property and slaves, levied upon by them previous to the filing of the insolvent's schedule. The record shows that the property seized was subject to judicial mortgages of an older date than theirs, and to a special mortgage in favor of L. Lastrapes, Desmare & Co. Although the law allows to the seizing creditor a privilege over the ordinary creditor, as a reward for his diligence, it clearly does not entitle him to be paid in preference to creditors holding prior liens or mortgages.

The appellants Lancaster, Denby & Co. have claimed, besides, the vendor's privilege on the proceeds of certain slaves, which they say were sold by them to Blackstone, who gave drafts for the price upon the firm of Wilkinson, McNeil & Co. of Natchez, who accepted the drafts, but took the title to the slaves in their own name, and gave a promise in writing to the insolvent to transfer the title to him as soon as he should have paid the debt, which he never did. They aver that their debt, for which they obtained

Eastman, Syndic, and others v. Beiller.

a judgment previous to the surrender, is a part of the price of those slaves, to which the insolvent has no claim or title, until their demand be paid. The appellants offered below no evidence whatever in support of these facts, but relied exclusively on a declaration of the insolvent in his schedule, which, to a certain extent, agrees with the statement they make in their opposition. The record shows that the insolvent has no recorded title to the slaves in question ; but it is proved that they have been in his possession since the year 1837, as his property. So early as the case of *Menendez v. The Syndics of Larionda*, reported in 3 Mart. 258, this court held, that, in a contest amongst the creditors, the confession or acknowledgment of the insolvent makes no proof against his creditors, because it is considered as fraudulent. We are not aware that the principle laid down in that decision, has been departed from in our subsequent adjudications. But were the appellants even permitted to avail themselves of the insolvent's declaration, it could not assist them. They do not claim the rescission of the sale, because the price has not been paid, but assert their right to a privilege as vendors, thus acknowledging the ownership of the insolvent as their vendee. After leaving the slaves a number of years in the possession of Blackstone, without taking any steps to preserve their privilege, they cannot claim it now to the prejudice of those creditors who have obtained judgments against him, or received from him special mortgages. Civ. Code, arts. 3238, 3241.

Judgment affirmed.

3r	220
116	596
3r	220
e120	291

MOSES EASTMAN, Syndic, and others v. JACOB BEILLER.

An agreement in fraud of the law, cannot be carried into effect.

To support the prescription of ten years, the title to the immoveable must be apparently good, and of a character to induce the belief, on the part of the possessor, that it is perfect. A title, defective on its face, will not be sufficient ; *aditer*, where the defect proceeds from circumstances or evidence *dehors* the instrument.

Where one assumes to sell without title, or without disclosing the defects in his title,

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the vendee, in good faith, though holding a *non domino*, may plead the prescription of ten years. Otherwise, where vendor sells only his right or interest, shows what it is, and declines to warrant generally, thus bringing home to the vendee a knowledge of his title.

APPEAL from the District Court of Concordia, *Curry, J.*

GARLAND, J. This suit is instituted to recover one-fourth of section No. 9, in township 10, north range, 12 east, which contains eight hundred *arpens* of land, and the whole of section No. 10, in the same township and range, containing a like quantity. The plaintiffs claim title to the one-fourth of section No. 9, under a patent from the United States to Hatton Middleton; and their title to section 10, is under a patent to Joseph Adair, to which they set up an equitable title, alleging that Adair settled and improved the land for Hatton Middleton, and that the confirmation in the name of Adair, was made in consequence of there being another title claimed by Middleton, as a settlement right, under the acts of Congress of 1805 and 1806, in relation to claims of that description.

The defendant claims the land by a sale from Adair, made in March, 1817, in which he sells the whole of the section No. 10, and an undivided fourth of section No. 9, which adjoins No. 10 on the upper side. There are various recitals in this deed, in relation to the transactions between Middleton and Adair about the land, which, if they prove anything, show that the parties understood the nature of the titles about to be transferred. The defendant also pleads the prescription of ten and thirty years.

We are satisfied that the plaintiffs have not a shadow of title to the section No. 10, which they claim. They show no deed from Adair to Middleton, and rely solely on the recitals in the deed from the former to the defendant. These recitals would, if construed and understood as the plaintiffs desire, prove that there was an agreement between Adair and Middleton to obtain two titles for the latter, by virtue of settlement and cultivation previous to December, 1803, which the law prohibited. Such an agreement, being in fraud of the acts of Congress, this court would not carry into effect, even if proved.

To divest the representatives of Hatten Middleton of the legal

title vested by the patent in him, the defendant relies upon two grounds: *First*. The agreement between Middleton and Adair, made in October, 1803, by which the latter consented to go upon the land claimed by the former, near the Petit Gulf Island, and clear ten acres of land so as to fit it for cultivation, and build a house of certain dimensions, in consideration of which Middleton agreed to convey to him two hundred *arpens* of the tract, to be taken from the upper side. *Second*. Upon his plea of prescription.

As to the first ground, the contract between the parties was commutative; Adair was to perform certain stipulations, and Middleton was to make a title when the improvements were made. It was a contract to sell when the price should be paid, and there is not sufficient evidence in the record to show any performance of the contract on the part of Adair. The evidence goes to prove most clearly that, after the contract was made, Adair, instead of making the improvements on the land claimed by Middleton, went upon a tract adjoining it below, improved, and lived on it a number of years, and, finally, obtained a title to it, by virtue of his settlement and cultivation previous to December, 1803. The contract was made in October, 1803, a short time previous to the actual cession of Louisiana by France to the United States. The treaty was well known at the time, and people were desirous of making improvements, and securing land for themselves, it being reasonable to suppose that the same rights and privileges would be accorded to settlers in Louisiana, which had been, but a short time previously, granted to those in the adjoining territory of Mississippi. 2 Laws U. S. p. 546. It is, therefore, very probable, that Adair thought it might be as well for him to make the improvements on a piece of vacant land, and thereby get a title for a section, instead of one for two hundred *arpens* only. The evidence that any improvement was made on section No. 9, back from the river, is loose and indefinite; and no witness testifies that the clearing was made by Adair. The land cleared by Benjamin Adair is included in section 10, and cannot avail the defendant. Had Joseph Adair cleared ten acres of land, and fitted it for cultivation, and built a log house in the latter part of the year 1803, it certainly would have been in his power to show that the im-

provement and house were there in 1807 or 1808, unless the latter had been destroyed or removed, which the witnesses, who testify as far back as that period, would be likely to have heard or known. There is no evidence that any house was on the premises in 1807 or 1808, and the clearing seems to have been a small one. At the same time Joseph Adair was living on section No. 10, and appears to have been there for a number of years. We are, therefore, of opinion, that the agreement between Middleton and Adair, does not, of itself, confer a title to the land on the latter.

The plea of the prescription of ten years will not, in our opinion, protect the defendant. Laying out of view all the questions raised as to the effect of Middleton having died out of the State, and of his heirs not having accepted his succession, we come directly to the deed from Adair to the defendant, and are of opinion it cannot form a basis for the prescription of ten years. It is well settled, that to become the basis of this prescription, the title must be apparently good, and of a kind calculated to induce a belief in the possessor that it is perfect. A title, defective in point of form, cannot be a basis for prescription. By this, the law means, a title, on the face of which some defect appears, and not one that may be proved defective by circumstances, or evidence *dehors* the instrument. 7 Mart. 403. 10 Ib. 436. 4 Ib. N. S. 213. 5 La. 240.

The title from Adair to the defendant is a quit-claim only. The vendor does not warrant the title against any one but himself, his heirs, and those claiming under him. In the deed an undivided portion of the land only is sold; no partition had been made; and an agreement to divide the land, made with a person not shown to have been authorized, has never been executed. An outstanding claim in Thirsby is mentioned, and other expressions are used, which make it clear that the parties did not understand that the title to the *locus in quo* was vested in Adair. Circumstances are shown, which prove that Adair did not possess *animo domini*, and that the defendant knew it. Where a vendor assumes to sell without title, or a disclosure of the defects in his title, the vendee, in good faith, though holding under a sale *a non domino*, may invoke the prescription of ten years. But the case is different, where

Benton v. Roberts.

the vendor sells only his right, title, and interest, and declines to give a general warranty, and sets out or shows the kind of claim, title, or interest he conveys, and brings home to his vendee a knowledge of his title. If the title turn out to be defective, the prescription of ten years will not protect the purchaser. 10 La. 283. The fact of a vendor refusing to guaranty the title he gives, is a circumstance calculated to excite suspicion as to it, and should put a vendee on his guard, and would, very probably, induce him to make inquiries as to the validity of the title.

The judgment of the District Court is, therefore, affirmed, so far as it quiets the defendant in his possession and title to the section No. 10, claimed by the plaintiffs; but so far as it relates to that portion of section No. 9, decreed to be the property of the defendant, the judgment is annulled and reversed, and it is ordered that the plaintiffs do recover of the defendant Jacob Beiller, that portion of section No. 9, in township No. 10, north range, No. 12 east, in his possession, containing two hundred *arpens* more or less, and that they be quieted in their title to the same. As relates to the question of fruits, revenues, and improvements, this case is remanded to the District Court to be proceeded in according to law. The costs in the District Court up to this period, and those of the appeal, to be paid by the defendant; and those hereafter incurred to abide the judgment to be hereafter rendered. In the meantime no writ of possession is to be issued.

Elam, for the appellants.

Stacy, for the defendant.

WARREN M. BENTON v. JAMES ROBERTS.

An execution cannot be enjoined, on grounds which might have been pleaded in defence before judgment.

APPEAL from the District Court of Carroll, *Curry*, J.

Copley and *Hyams*, for the appellant.

Dunlap, for the defendant.

GARLAND, J. The petition represents that on the 22d of July,

1840, the defendant, who is a resident of Virginia, obtained a judgment against the plaintiff for \$5121 50, with interest, &c., from which the latter appealed to this court, but that his appeal was illegally dismissed, and that the sheriff was about to execute the judgment by seizing and advertising for sale a judgment, which he (plaintiff,) had obtained against Abner C. and James Roberts, on the 31st of May, 1841. It is further alleged, that the execution on the judgment of the defendant against the plaintiff, was issued illegally and improvidently, because the judgment was illegally rendered, and is oppressive and unjust. The plaintiff avers that the sheriff will sell the judgment obtained by him against the defendant and A. C. Roberts, unless prevented. He alleges that an injunction ought to be granted him :

First, Because he has paid James Roberts \$1102 02 in cash or otherwise, which sum should have been credited on the judgment and execution, it having been paid previous to the rendition of the judgment.

Second, Because, as he alleges, Abner C. Roberts and James Roberts owe him, *in solido*, a note, the amount of which was due on the 1st of March, 1840, for the sum of \$4880, less \$675, of which he is the endorsee, which note is secured by mortgage, and which he has a right to have compensated against the judgment attempted to be executed. The various sums which make up the \$1102 02, according to the plaintiff's own statements, were existing in 1838, previous to the judgment rendered in favor of the present defendant. An injunction was granted on these allegations against the sheriff and James Roberts, he being a non-resident. The sheriff accepted a service for himself, and the petition and citation intended for James Roberts were served, as the sheriff returns, by handing them to his attorney, L. Selby, he representing said Roberts.

The defendant moved to dissolve the injunction *instante* :

First, Because the petition states the defendant to be an absentee, and no person has ever been legally appointed to represent him.

Second, Because the affidavit is insufficient ; it stating that all the allegations in the petition are true, when there is nothing stated to justify an injunction.

Third, If the judgment of the defendant against the plaintiff was illegally rendered, the remedy is by appeal; and if the Supreme Court acted wrong in dismissing the appeal, the District Court has no jurisdiction to redress the injury.

Fourth, Because the matters stated as ground of injunction, according to plaintiff's own allegations, might have been pleaded in the defence of the case in which the judgment has been enjoined, and some actually were so pleaded; and because it is now too late to present them.

Fifth, Because his judgment is for \$5121 50, with interest, and the amount claimed to be compensated only \$4812, and interest.

He further prays for interest, damages, and costs.

The case was tried on the allegations in the petition, without any evidence except as to the value of the attorney's fee. The injunction was dissolved, and the judge gave a judgment against the plaintiff and his security on the injunction bond, for the sum of \$250 for counsel fees, as special damages, for five per cent interest on the judgment enjoined amounting to \$354, and for \$728 damages under the act of 1831, relative to injunctions.

As the case now stands, it must be decided on the allegations in the petition, which are to be taken as true. Those in relation to the judgment alleged to have been seized, are very vague and loose. The amount of the judgment is not stated, so that a credit could be entered; but the date and the number of the suit is given, by which we are enabled to see, that the judgment alluded to was reversed by this court, so far as it relates to James Roberts, at the last October term. 1 Robinson, 101.

As to the demands which Benton now wishes to plead in compensation, they all existed, according to his own showing, previous to the judgment against him. It has been long settled by this court, that an injunction cannot issue to stay an execution, on grounds which might have been pleaded in defence before the judgment. 8 La. 134. Idem. 273. 2 La. 191. 1 Mart. N. S. 71. 8 Ib. N. S. 513. Litigation might be greatly protracted, were it permitted to a defendant to withhold his pleas of payment or compensation, until after a judgment, and then arrest an execution, for the purpose of settling questions which, with more pro-

 Travis v. January. *

priety, should have been decided when the first suit was on trial. The attempt to arrest a judgment, because this court and the inferior tribunal have decided the case incorrectly, is only calculated to bring into ridicule the plaintiff, and those who advised him to institute such a suit.

We do not think that the judge erred in dissolving the injunction. As to the damages they seem to us very large; but there is no evidence in the record that enables us to say whether the judge exercised a sound legal discretion or not.

Judgment affirmed.

URBAN E. TRAVIS v. JOHN M. JANUARY.

It is no objection to a witness that he is interested in a case, when offered to testify against his interest.

An attorney is not admissible as a witness to disclose facts, the knowledge of which he acquired confidentially, in the practice of his profession. But when in possession of papers belonging to his client's adversary, or when called on, after having had them in his possession, to disclose what he has done with them, or to point out where they may be found, the rule does not apply; and he may be as properly called on to produce the papers necessary to establish the rights of the adverse party, if still in his possession, or interrogated as to facts which may lead to their discovery, as his client himself could be. C. P. 140, 473.

APPEAL from the District Court of Carroll, *Bosworth*, J. presiding.*

SIMON, J. The plaintiff sues for the recovery of two tracts of land, which he alleges to be in the possession of the defendant. He avers that he derived his title to the property claimed, by entry and purchase of the United States, made at Ouachita, and prays that the defendant be ejected and put out of possession of the land, and condemned to pay him five hundred dollars a year, from the time of his illegal detention thereof, &c.

The defendant answers by pleading the general issue, and by averring that he is in possession of no land except what he bought

* *Tenney*, J. had recused himself.

Travis v. January.

of Gideon Gibson, by two acts of sale which he annexes to his answer; and he prays that his vendor be called in warranty. For this purpose, a curator *ad hoc* was appointed to represent G. Gibson, who resides in the State of Mississippi, and afterwards an answer was filed by his counsel, stating that Gibson really sold the land sued for to the defendant January, and that all the allegations, showing that said January was possessed of a good title to the land, are true. He further alleges, that he purchased the land in controversy from Francis Y. and Thomas E. Tompkins, by an act under private signature, which has been misplaced or lost; and prays that his vendors be also called in warranty, and required to answer, under oath, certain interrogatories annexed to his answer, for the purpose of establishing the sale of the land by F. Y. and T. E. Tompkins to him.

F. Y. and T. E. Tompkins admit that they sold the land sued for to Gideon Gibson, by an act under private signature, or bond to make a title; and state that they bought the land in dispute from the plaintiff, Urban E. Travis; that, for the land sued for and another tract, they executed their three promissory notes, each for \$3433 33, payable in three instalments; that on the same day, Travis, their vendor, executed to them his bond for \$20,600, to make a good title in fee simple to the land in their favor; that they were put in possession of the land by Travis on the day the notes and bond were executed; that, if the said bond for title be in possession of the plaintiff, the same was obtained by him without their consent or knowledge; and that said Travis secretly conceals and retains the said bond for title, so that they cannot get possession thereof. They also allege that they have paid the two first instalments, and a part of the third one; and that having been sued by Travis for the balance, a judgment was obtained by him against them. They pray that Travis be required to produce the bond for title, and that the plaintiff be declared to have no right or title in and to the land by him sued for.

The District Judge having recused himself, this case was tried before the Parish Judge of the parish of Carroll, who gave judgment in favor of the plaintiff; from which judgment the defendant has appealed.

The record contains several bills of exception, two of which we shall now proceed to examine. The first of these bills of exception was taken to the opinion of the judge *a quo*, rejecting the testimony of Matthew B. Sellers, a witness introduced by the defendant. This witness, at the request of the plaintiff, having been sworn on his *voir dire*, stated that he was interested in the result of this case, as he had purchased part of the interest of the plaintiff; and that he would be a loser if the suit should be decided against the plaintiff, and the defendant should succeed in sustaining his defence. The defendant persisted in offering him as a witness, as his interest was against him, and as he was not a party of record in the action. The plaintiff objected to his admissibility, and to his being sworn as a witness for the defendant. This objection was sustained by the court.

We think the judge erred. There is no rule of evidence better settled in our jurisprudence, than that a person interested in a cause, is an objectionable witness only, when offered to prove a fact consistent with his interest; for, if the testimony he is to give be contrary to his interest, he is then the best possible witness that can be called, and no objection can be made to him. 3 Mart. 86. 4 Ib. 472. 6 Ib. 256. 4 Mart. N. S. 172. It is clear that the judge *a quo* ought to have permitted him to be examined, and that his testimony was erroneously rejected.

Before expressing our opinion on the subject of the second bill of exceptions, it is first necessary to notice the facts that gave rise to the motion made by the defendant's counsel in the course of the trial, which motion was overruled by the lower court. It appears that the plaintiff's brother, who was examined as a witness, had once in his possession the document alluded to in the answer of the warrantors, F. Y. and T. E. Tompkins, as being an act under private signature, or bond for title, from the plaintiff to F. Y. and T. E. Tompkins for the land sued for; and that said witness, who acted as the plaintiff's agent, obtained possession of it from F. Y. Tompkins. He states that his object in getting the paper of F. Y. Tompkins was to get the land, and that he was advised to do so; that he does not recollect particularly by whom he was advised to obtain the paper, but presumes he was so advised by his brother,

and, perhaps, by his brother's counsel, &c. He further states that, he does not think he has the paper. He states also, that he does not know what he did with it; but presumes, if he has parted with it, that he gave it to his brother's counsel. This disclosure gave rise immediately to a motion by the defendant's counsel, for a rule on the plaintiff's attorneys to produce in court the act of sale, or bond for title, alluded to in the evidence of the plaintiff's brother, and, in default thereof, to state under oath whether they have had the same in their possession since the institution of this suit, and especially since the beginning of the trial; or whether the same is now, or has been in the possession of either of them; and what they have done with it, if they have not the same in their possession. This motion was made on the ground that the document called for is now, and was, when the same was obtained by the plaintiff's brother as the agent of said plaintiff, the property of the defendant; and was resisted by the plaintiff's counsel, on the ground that they cannot be permitted or bound to disclose confidential communications made to them by their client as counsel. This objection was sustained by the court, which overruled the motion made by the defendant's counsel; and a bill of exceptions was taken.

With regard to attorneys who may be called on to testify in a cause, the rule has often been recognized by this court, that an attorney at law is not admissible as a witness, where he is called on to disclose facts, the knowledge of which was acquired confidentially in the practice of his profession. 4 Mart. N. S. 362. 6 Ib. 284. But where an attorney is in possession of title papers and documents belonging to his client's adversary, or, is called on, after having had such papers and documents in his possession, to disclose what he has done with them, or to point out where they can be found, we think the rule does not apply; and that the attorney may be as properly called on to produce the papers and documents necessary to establish the rights of the adverse party, if they be in his possession, or interrogated as to the facts which may lead to a discovery of the place where they can be procured, as his client himself could be under our laws. Code of Pract. arts. 140, 473. In this case, it is clear that the document sought to

be produced did not belong to the plaintiff; that the plaintiff, or his counsel, have no right to keep it in their possession; and that, as a muniment of the defendant's title, keeping it from the rightful owner, contrary to his consent, would amount, to a gross fraud upon him. In vain would it be contended that the paper in question was secretly and confidentially placed in the possession of the counsel by their client; for, if such a proposition were to be for a moment adhered to, it would often be used as a shield under which parties litigant would be enabled to commit the grossest and most flagrant frauds to the prejudice of their adversaries. We must say that a proposition so unreasonable in itself, and so contrary to law, cannot in any manner be countenanced by us, as its absurdity is fully demonstrated by the injurious effect its consequences would have on the legal rights of those who are compelled to seek justice at our hands. *Comstock et al. v. Paie and Smith*, 18 La. 479.

- We think, therefore, that the judge *a quo* erred, in overruling the motion made by the defendant's counsel, and that the rule applied for should have been granted.

It is, therefore, ordered, that the judgment appealed from be annulled and reversed; that this case be remanded to the lower court for a new trial, with instructions to the judge *a quo* not to reject the testimony of Matthew B. Sellers, and to grant the rule applied for by the defendant's counsel, according to the principles expressed in the foregoing opinion; and that the plaintiff and appellee pay the costs of this appeal.

Copley, for the plaintiff.

T. N. Peirce and Dunlap, for the appellant.

Putnam v. The Grand Gulf Rail Road and Banking Company.

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3r 223
50 1080

**ALBIGENCE WALDO PUTNAM v. THE PRESIDENT AND DIRECTORS
OF THE GRAND GULF RAIL ROAD AND BANKING COMPANY.**

The formalities prescribed by art 254 of the Code of Practice, which requires where the defendant has no known place of residence, or conceals his person, or is absent, or resides out of the State, that the sheriff shall serve the attachment and citation, by affixing copies thereof to the door of the parish church of the place, or to that of the room where the court in which the suit is pending is held, stand in the place of citation, and form the basis on which all subsequent proceedings must rest, and their omission will be fatal. Service of citation on the defendant, is the first step to be taken.

The remedy by attachment is a harsh one, and those who resort to it, must comply strictly with the requisites of the law.

APPEAL from the District Court of Madison, *Curry, J.*

Dunlap, for the appellant.

Stacy, for the defendants.

MORPHY, J. This is an appeal from a judgment dismissing proceedings instituted under our attachment laws. The suit was brought, and an order granting an attachment obtained, on the 4th of February, 1842; several persons were made garnishees, and regularly cited at different times. The sheriff annexed to the return he made on the 7th of February, a list of the effects attached, but failed to serve the attachment and citation on the defendants, who are non-residents, by affixing copies of the same on the door of the parish church, or that of the room where the court in which the suit was pending is held. On the third of May following, the plaintiff took a judgment by default; whereupon the court, on the same day, appointed an attorney at law to represent the absent defendants. The attorney moved for the dissolution of the attachment, on the ground that all the proceedings in the case were null and void, no legal citation having been served, as required by law. The judge, in our opinion, properly sustained the motion. We have repeatedly held that the formalities prescribed by article 254 of the Code of Practice, stand in place of a citation, and that they form the basis on which all the subsequent proceedings in the cause must rest; the omission of them must, therefore, be fatal. Code of Prac. 206. 10 Mart. 472. 7 Mart. N.S. 160. 8 Ib. N. S. 351. 8 La. 587. 3 Ib. 18. A service was attempted to be

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made on the 6th of May, of the writ which was issued in February, long after it had been returned into the clerk's office, and after the motion to dismiss the proceedings had been made. This could not, in our opinion, cure the radical defect, which rendered null and void all that had been done in the suit, after the filing of the petition. The first step to be taken was to serve process of citation on the defendants, in the manner required by law. Code of Prac. arts. 254, 256. As to the motion of the plaintiff to annul the appointment of the attorney to represent the absent defendants, as prematurely made, we think that when the plaintiff had proceeded to take a judgment by default, it was high time that the former should have been provided with counsel, pursuant to article 260 of the Code of Practice. We are by no means disposed to relax any thing of the strictness and rigor with which we have heretofore construed our attachment laws. The remedy they provide is, in itself, a harsh and extraordinary one, and those who resort to it have no right to complain, if they are held to a strict compliance with all the requirements of our statutes on the subject.

Judgment affirmed.

ELIZABETH NOULEN and others v. JOHN PERKINS.

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Where one entitled to claim a tract of land, as an actual settler prior to the twentieth of December, 1803, under the act of Congress of the third of March, 1807, relative to land claims in the territories of Orleans and Louisiana, sells all his right, title, and interest therein, and the claim is subsequently confirmed in the name of the original settler, the confirmation will enure to the benefit of his vendee.

One who sells all his right, title, and interest in an improvement made on the public lands, must be considered as parting with all the ulterior advantages to which he may be entitled in virtue thereof.

APPEAL from the District Court of Madison, Curry, J.

Copley, for the appellants.

Stacy, for the defendant.

BULLARD, J. The plaintiffs assert title to a tract of land of six hundred and forty acres, on the bayou Vidal, being a confirmed

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claim B, No. 1507, which their ancestor acquired from James Ussery on the twentieth of July, 1826, and alleges that the defendant John Perkins has taken possession of it, and sets up title to the same. They pray for judgment for the land, and for ten thousand dollars for rents and profits.

The defendant's answer denies the heirship of the plaintiffs, and the capacities in which they sue. He further sets up title in himself derived from Elias Barnes, who he avers had a good title by a regular chain of conveyances from James Ussery, in whose favor the title was confirmed by certificate B, No. 1507, and who sold the same in July, 1808, to one Yearington. He further avers, that if Ussery ever sold the tract of land to Noulén, the sale was fraudulent and void, as Noulén knew at the time of said sale that Ussery had previously divested himself of title. He pleads prescription; asserts that the plaintiffs have recognized his title by fixing the boundary line between said tract and the Marble tract belonging to said Noulén; and concludes by calling in his warrantors, the heirs of Barnes. The latter cited the heirs of Joshua G. Clark, as their warrantors.

The plaintiffs have appealed from a judgment against them.

Both parties claim to hold under Ussery, who, in 1811, appears to have obtained a confirmation from the Land Commissioners at Opelousas, of his claim to the land in dispute, which claim was founded on settlement and occupancy by the claimant, with the permission of the Commandant of Concordia, on and previously to the twentieth of December, 1803. The land is described as situated on the bayou Vidal, bounded on one side by Thomas Marble, and on the other by vacant land.

The plaintiffs gave in evidence an act of sale from Ussery to James Noulén, their ancestor, dated in 1826, in which the land is described, as "a claim tract of land on the bayou Vidal, bounded on the north-east by the Marble tract of land, and extending thence down the bayou to John Perkins' corner."

The defendant, on the other hand, gave in evidence a deed from Ussery to Yearington, in which he acknowledges to have sold to him all his right, title, interest, and claim to an improvement which he made on lands belonging to the United States on the bayou Vidal, about eight miles down the bayou from the com-

mon landing place, now adjoining the improvement of Thomas Marble and Wilkinson. This deed bears date the 2d July, 1808, and appears to have been recorded in the office of the Parish Judge of the parish of Warren in 1812. This deed, and the recording of it, we consider sufficiently proved, by evidence properly admitted on the trial.

It appears, then, that Ussery, shortly after the passage of the act of Congress of 1807, relating to actual settlers before the cession of Louisiana, sold to Yearington all his right, title, interest, and claim to his improvement on the public lands, and that the claim was afterwards confirmed in the name of the original settler; and the question is, whether such confirmation enured to the benefit of Yearington, and his assigns. We cannot regard this as an open question. The case of *O'Brian's Heirs v. Smith*, 16 La. 95, appears to us directly in point, as well as several others to which we refer. See 9 La. 99. 12 Ib. 172.

But it is contended by the plaintiffs' counsel, that Ussery sold, not the *land*, but his *improvement*; that the *land* was not his at the date of his deed, and he could not sell it, but that his intention was to sell nothing more than his clearing. Words used by parties in their contracts, are to be taken in their ordinary signification. In common parlance a man who sells his *right, title, interest, and claim* to an improvement made by him on the public lands, must be considered as having parted with all the ulterior advantages to which he may be entitled, in virtue of his improvement, under the laws of the country. The contrary construction supposes the sale of a mere abstraction—a thing difficult to conceive—an improvement without any right *to*, or title *in* the land upon which the improvement was made, which never could be either delivered or enjoyed, and inseparable from the land itself.

Being of opinion, that the confirmation enured to the benefit of Yearington, and that Noulen acquired no title by his contract with Ussery in 1826, we consider that the plaintiffs have failed to show title in themselves, and cannot recover; and that it is not necessary to examine other questions which arose in the progress of the trial.

Judgment affirmed.

FREDERICK ZOLLICOFFER v. CHARLES BRIGGS and others.

The signature of the petitioner to an affidavit which the law requires to be annexed to the petition, is a sufficient signature of the petition itself.

There is a class of exceptions which may be pleaded for the first time on the appeal; but the facts necessary to sustain them, must appear from a mere inspection of the record.

THE plaintiff is appellant from a judgment of the District Court of Concordia, *Tenney, J.*

BULLARD, J. The appellees move to dismiss this appeal on the ground that there is no legal statement of facts, no bill of exceptions, and no such assignment of errors as will enable the court to test the correctness of the judgment below.

This motion must be overruled. The assignment of errors is sufficient to call our attention to the alleged error which appears upon the record. It is in substance, that the exception to the petition, on the ground that it was not signed, was improperly sustained and the suit dismissed, because it appears that the affidavit, which was annexed to, and formed a part of the petition, was signed by the petitioner, which was a sufficient signing of the petition. It seems to us, that the signature of the petitioner to an affidavit, which the law requires shall be annexed to his petition, swearing to the facts therein alleged, is a sufficient signature of the petition itself. The petition begins, in the usual form, as the petition of F. Zollicoffer; it does not appear that it was written by any body but himself, and he swears to it as his petition. We think this sufficient.

But it is urged, on the other side, that it does not appear, whether the attachment was dissolved and the suit dismissed, on that ground, or after trial upon the merits. The case is not before us upon the merits, as the parties appellant have not brought up the evidence, if any was offered on the trial. In the absence of evidence to show a trial and judgment upon the merits, we are to infer that the case went off upon the exception. Nothing shows that the exception was waived.

The answer below contained, also, a general denial. The appellees in this court, plead *res judicata*, alleging that all the mat-

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ters and things involved in this suit, were finally settled and determined by this court, at the last October term, in the case of *Zollicoffer v. Briggs, Lacoste & Co.*, reported in 19 La. 521, that suit being between the same parties, in the same capacities, and upon the same matters in controversy.

There is a class of exceptions, which may be pleaded for the first time, on the appeal. They are such as may be pleaded at any period of the cause; but the proof of them must appear from a mere examination of the record. Prescription is mentioned, *exempli gratia*; but the right is given to the party to whom it is opposed, to have the cause remanded for a trial upon the plea. Code of Prac. art. 902. Admitting that the exception *rei judicatæ*, is of that class, yet, in this case, nothing in the record from the court below shows that the same matters have been previously decided by this court. To inquire into this exception would violate a well settled principle and rule of proceeding, that this court can only exercise its jurisdiction in so far as it shall have knowledge of the matters argued or contested below. Code of Prac. art. 895. 8 Mart. N. S. 435. 1 La. 323. 3 Ib. 516. 6 Ib. 402.

Believing that the court erred in dismissing the suit, and that we cannot inquire into the plea of *res judicata*, the judgment must be reversed. It is, therefore, ordered and decreed, that the judgment be reversed, and the case remanded for further proceedings according to law; the appellees paying the costs of the appeal.

F. B. Farrar, for the appellant.

Stacy, for the defendants.

SAMUEL A. CARTWRIGHT v. FRANCES A. DENNY and others.

THE defendants are appellants from a judgment of the District Court of Concordia, *Curry, J.*

Stacy and Lawrence, for the plaintiff.

F. H. Farrar, for the appellants.

BULLARD, J. The petitioner represents himself, and the heirs of Lintot, as owners of two adjoining tracts of land on Lake Con-

cordia, one of which, now owned by him, formerly belonged to William Blount, containing 450 *arpens*, and was held under a title, commonly called a *Requête* and permission to settle, in his favor, bearing date the 14th Nov. 1802, given by Don José Vidal, Commandant of the post of Concordia, and a survey by Pedro Walker, confirmed by the Land Commissioners at Opelousas. That the tract owned by the heirs of Lintot contains 560 superficial *arpens* fronting on the lake, bounded on the north-west by the above tract of Blount. He represents that a difficulty has arisen between him and the heirs of Lintot, in relation to the fixing the true and correct boundary line between the two adjoining tracts. That the heirs of Lintot claim a line running through the land of the plaintiff, which, if permitted, would greatly injure him, by cutting off a large part of his land. That the true boundary line is no longer to be seen; and that it has become necessary that the same should be investigated, sought for, and established by judicial authority, which he prays may be done accordingly.

The defendants aver, that they are the owners of a tract of land containing 560 *arpens*, called the Lintot tract. They admit that their ancestor acquired title by virtue of a *Requête* and permission to settle, and actual survey made by proper authority, both dated the 14th of Nov., 1802; that their title has been confirmed by the Land Commissioners; that, about that time, William Lintot took possession of the tract, and, on the north-western line, where it is bounded by Blount's tract, cleared and cultivated about eighty acres; that he retained possession of the said clearing, as being within his boundary, according to the survey, and never abandoned the possession during his lifetime, and that his heirs have remained in possession since his death, and always claimed the same boundary; and that the plaintiff, and one Megee, rented said eighty acres from the respondents during the year 1832, and cultivated the same as their tenants. They further pleaded prescription.

The primitive title under which the defendants hold, bears the same date with that of the plaintiff; and the survey appears to have been made on the same day. The only difference is, that the defendants' title calls to be bounded on one side by Blount; and Blount's, at the time of the survey, was bounded on one side by the lake, and on the other three by the domain.

The Spanish surveys, which are before us, exhibit the two tracts as they are described in the pleadings; that of Lintot, as bounded on one side by Minor, on the other by Blount, having its front on Lake Concordia, with side lines three hundred perches in length, but the length of the front and back lines not given—the area to contain 560 *arpens*. The corner of Minor's and Lintot's land on the lake is represented by a hoop ash, and the upper corner of the survey by an oak. The front of the Blount tract is given; it is two hundred perches; but the land is represented as bounded on all the other sides by the domain. The north-eastern line runs from the lake, in a direction N. 33 E., and corresponds with the north-western line of the Lintot tract adjoining; and the problem to be solved in this case, is, the discovery and establishment of this division line. There does not appear to be any dispute as to the corner of the Lintot and Minor tracts on the lake.

The parties differ widely as to the division line. The disputed ground is an area of about 218 acres. The plaintiff contending that the line, according to the titles, is to be determined by beginning at the corner of the Lintot and Minor tracts on the lake, and running such a distance up the lake as will give the superficies represented on the original survey by Walker. The defendants, on the other hand, insist that there was an acknowledged boundary, by which the adjacent proprietors held the land, beginning at the north-western side of an old clearing, which is represented on the plat by small dotted lines.

To this it is answered by the plaintiff, that the evidence does not establish any such conventional line; that there are no landmarks in that direction, to indicate that such a line had been run by the surveyor; that it would give to the defendants much more land than their title calls for; that running the defendants' front from the acknowledged corner, in the direction indicated by the old marks upon the lines, would throw the upper corner contended for by the defendants, some distance into the lake. On the other hand, it is urged, that Walker's survey calls for an oak at the upper corner of the defendants' land; that the stump of this oak remains, with ancient surveyor's marks upon it, at the distance of 250 perches from the lower corner; that the marks extend be-

tween those two points, and no farther up the lake ; that a front of 250 perches by a depth of 300, the side lines converging towards the depth 23 degrees, would give even more than the area called for by the defendants' title ; and, consequently, that the line contended for by him conforms both to the titles and to the marks upon the trees.

It cannot be disputed, that the location of the Lintot tract, as contended for by the plaintiff, conforms to the primitive titles, and is not contrary to the description of the land given in the mesne conveyances ; and that the line B. H. must be held to be the true boundary between the parties, unless the parol evidence establishes a conventional line, or the action be barred by prescription. The evidence we think insufficient to establish prescription, and it, therefore, only remains to inquire whether the defendants have shown, by satisfactory evidence, that the division line, as claimed by them, was ever agreed to by the proprietors of the adjacent tracts.

The defendants rely upon the testimony of Thomas Alexander and Dr. Kerr, to establish the line D. J., on the plat made by the surveyor under the order of court, as the true line run by Walker, and that it was always claimed by the defendants, and admitted by Blount and every subsequent owner, as the true division line. The counsel do not contend that there are any natural objects or artificial monuments described and called for in the title papers and surveys, which are now to be seen, and which are identified by the witnesses. They, however, contend that this line is conclusively established.

Alexander swears that he knows the line D. J. ; that he pointed out an ash tree marked W. B., at the point K., to some surveyors who, he understood, were surveying the land for the parties. That there was an old line, well marked, running from the ash to an old field which is cleared, two or three hundred yards from the bank of the lake. The line was continued until it struck the lake, at which they could not find any corner, and to a point claimed at D. It may be remarked, in passing, that from K to D, the distance is not 300 perches, and of course the ash could not be a corner tree of the survey by Walker ; and there is no evidence that it was afterwards agreed upon by the parties. The

witness thinks there was no land cleared to the east of that line, in 1809. He proves the improvement made by the heirs of Lintot to the eastward of that line, and that there was a fence upon the line spoken of.

Dr. Kerr had known the two tracts of land for a long time, and had rented the old field from the heirs of Lintot. He says that near the fence there were trees understood and recognized to be the corner of the two tracts by the overseer of the Blount tract, and by those interested in making the levees. He says that Green, when owner of the Blount tract, rented the same field from the heirs of Lintot, as well as all the succeeding owners.

A careful examination of the evidence, and particularly of the testimony of the two witnesses mainly relied on, has failed to satisfy us that the line contended for by the defendants, has ever been settled and agreed upon, as the division line between the two tracts. The titles are consequently to govern.

The lines, as run by the Spanish surveyor, can no longer be traced with any certainty, by means of monuments or land marks, but the controlling calls of the original titles are simple, and easily followed. The two tracts are separated from each other by a line at a distance of about twenty-five *arpens*, on the lake, from Minor's land below, according to the Commissioner's certificate, which runs north thirty-three degrees east a distance of thirty *arpens*. The operations of the surveyor, who surveyed the land under the order of the court, show this line to be represented on the plat by the letters B. H. The District Court concluded that this was the division line between the parties, and decreed, accordingly; and we are not satisfied that it erred.

Judgment affirmed.

SAMUEL NICHOLSON v. WILLIAM MARDERS.

Where one receives his letters and papers from two post offices in the neighborhood of his residence, notices of protest must be directed to him at the office nearest thereto.

APPEAL from the District Court of Concordia, Curry, J.

F. H. Farrar and Dunlap, for the appellant.

Stacy, for the defendant.

MARTIN, J. The plaintiff is appellant from a judgment of non-suit. The defendant was sued as endorser of a note payable in bank, and his counsel urged that the plaintiff had failed to prove a sufficient demand of the maker, and due notice to the endorser. It appears that the note was the property of the Bank, or at least placed with it for collection, for the protest is made at the request of the cashier, and the maker had no funds there to take it up.

The notice was given by placing in the post office at Natchez, a letter containing it, directed to *William Marders, Natchez*, which the notary deposes is, according to the best information he could obtain, the office at which the defendant receives his letters and papers. He is a resident of the parish of Concordia, in which there was no post office at the time. The post offices at Natchez and Rodney are the nearest to the defendant's house, and it is in proof that he received his letters and papers at each of these offices.

We have already held, that where a party receives his letters and papers at two post offices in the neighborhood of his house, notice must be directed to him at the post office nearest his residence. *Mechanics and Traders Bank of New Orleans v. Compton and others, ante*, p. 4. In the present case, although one or two witnesses are of opinion that Natchez is nearer to the house of the defendant than Rodney, the greatest number of them consider Rodney as the nearest post office.

Judgment affirmed.

THE COMMERCIAL BANK OF NATCHEZ v. THOMPSON L. KING and others.

A party to a suit is not bound to answer interrogatories propounded to him by his opponent, unless ordered to do so by the court. C. P. 348.

A document, certified by the Secretary of State of another State, under his hand and the great seal of the State, to be a correct copy of an act of the Legislature, on file in his office as having been approved on a particular day, is sufficiently attested.

Proof that notice of protest was deposited in the post office at seven o'clock, A. M. the day after the protest, shows due diligence; and it will be presumed, in the absence of evidence to the contrary, that the notice was in time to go by the mail of that day.

Where a party has repeatedly and publicly declared himself to be a resident of a particular parish, he will not be allowed, though actually residing elsewhere, to gainsay his own declarations, which may have misled others.

APPEAL from the District Court of Madison, *Curry, J.*

Stacy, for the plaintiffs.

Stockton, for the appellant.

MORPHY, J. This suit is brought against the maker and endorsers of a promissory note for \$3421 69, negotiable and payable at the Commercial Bank of Natchez, in Mississippi. The defendants made a joint answer, in which, after admitting their signatures, they expressly deny the capacity of the plaintiffs to sue, and allege that they have long since paid the sum claimed of them. They aver that cotton was shipped to the plaintiffs by King, the maker of the note sued on, to pay the same, which cotton was received by them. They pray that the demand may be rejected; and attach to their answer interrogatories which they pray may be answered by the plaintiffs. There was a judgment below in favor of the latter, from which, Robert Dunbar, one of the endorsers of the note, has appealed.

The plaintiffs have not, nor were they bound to answer the interrogatories propounded to them, as the defendants obtained no order of the court requiring them to do so. Code of Prac. art. 348. The plea of payment set up in their answer, is so indefinite and vague, as to manner, time and amount, that it is doubtful whether any evidence could have been admitted under it; but it was not even attempted to be supported by evidence.

A bill of exceptions was taken, on the trial, to the admission of

a document offered by the petitioners, to prove that they are incorporated as a banking institution in the State of Mississippi. The objection was, that the paper contains no part of the law of Mississippi, as it does not appear to have been approved by the Governor, or signed by the President of the Senate, or the Speaker of the House of Representatives of that State, which requisites, it is said, are necessary to constitute a law in Mississippi; and, moreover, that the document is not declared or certified to contain any law of that State. The paper offered in evidence is certified by the Secretary of State of Mississippi, under his hand, and the great seal of that State, to be a correct and perfect copy of an act, entitled, "An Act to incorporate the Commercial Bank of Natchez," which is on file in his office, as having been approved on the 27th of February, 1836. This we hold to be satisfactory evidence that the paper contains a true transcript of a law of Mississippi, incorporating the petitioners, and giving them the right to sue under the name and style they have assumed in the premises.

On the merits, the evidence shows that the note was protested on the 19th of February, 1839, and that a written notice of such protest was placed in the post office at Natchez, the next day, at seven o'clock, A. M., directed to Robert Dunbar, at New Carthage, in Louisiana.

To this notice two objections are made :

First. That the plaintiffs have not shown at what hour of the day the mail leaves Natchez, or that the notice was put into the office in time to go out by that day's post.

Second. That the notice should have been directed and sent to Robert Dunbar, at his residence, at about one mile from Natchez, and not directed to New Carthage, in Louisiana.

I. The party has, in our opinion, shown due diligence, by depositing the notice of protest in the post office at such an early hour on the morning after the protest. We may well presume that it was placed there in time to go by the mail of that day, if there was one, as the defendant has not attempted to prove, as he might have done, that the mail left Natchez that day at an earlier hour. Bailey on Bills, p. 264. 10 Mart. 89. 1 La. 125.

II. In relation to the residence of this endorser, there is an admission in the record that, during the years 1838 and 1839, he

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was, *in fact*, a resident and citizen of Adams county in Mississippi, and lived about a mile from Natchez ; but that during those years, Dunbar uniformly, openly and publicly proclaimed himself to be a citizen and resident of the parish of Madison, in Louisiana, and always held himself out as such to all persons. The evidence moreover shows, that he has a plantation in the parish of Madison, about seven miles from New Carthage, which is the nearest post office ; that he frequently visits the parish ; that he was a member of the Police Jury of Madison in 1838, and for several successive terms ; that his seat was once contested on the ground that he was not a resident of the parish, but that the Police Jury decided that he had a right to retain his seat. Without inquiring into the motives of this defendant for thus representing himself as a resident of Madison, we think that he should be bound by his repeated and public declarations on the subject, and should not be permitted to gainsay them. They may have induced, and probably, did induce, the notary to direct the notice to him at New Carthage, in the parish of Madison.

Judgment affirmed.

WILLIAM JOHNSON and others v. LEANDER F. ARDREY.

APPEAL from the District Court of Rapides, *Boyce, J.*

MARTIN, J. The plaintiffs and appellants have placed this case before us, on the following assignment of errors : That the confession of judgment by the defendant, recognizes the vendor's privilege, in favor of the plaintiffs, on "*twenty mules and two mares*," whereas the judgment entered up, by reason of such confession, erroneously recognizes the vendor's privilege on "*twenty mares and two mules*." The error is apparent on the face of the record.

It is, therefore, ordered, that the judgment be annulled, and reversed ; and that the plaintiffs recover from the defendant the sum of two thousand two hundred dollars, with interest at the rate of ten per cent per annum, from 1st of March, 1840, with the vendor's

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privilege on twenty mules and two mares in the defendant's possession, which are to be sold accordingly, with costs in both courts.

Hyams, for the appellants, submitted the case without argument. No counsel appeared for the defendant.

JAMES D. KERR v. ZACHARIAH H. DORSEY.

APPEAL from the District Court of Carroll, *Curry*, J.

MARTIN, J. The plaintiff is appellant from a judgment sustaining a plea of payment by the defendant. He has first drawn our attention to a bill of exceptions, which he took to the admission in evidence of the following documents: a receipt of the defendant to Williamson Lises; a note payable to Wm. H. King, signature torn off; a due bill to Williamson Lises, signature torn off; a due bill to C. Lises, signature torn off; an order of Wm. Lises on S. Pulley, in favor of the defendant; and a due bill in favor of Williamson Lises, and an order on Wm. Boyle to pay it, signature torn off.

He also objected to the admission of Dobbins, Pulley, and Parrish, as witnesses. The objection to these documents and witnesses, was on the score of irrelevancy to the issue. The court expressed its opinion that circumstantial evidence is admissible to prove payment, and consequently that any circumstance going to raise the presumption of payment is admissible.

There is nothing in this bill which enables us to judge of the relevancy or irrelevancy of the testimony of these witnesses, nor perhaps of that of the document; but as the whole was received, and the case was not tried by a jury, it is of little importance to inquire whether the bill of exceptions was properly taken.

The plaintiff sues on a note of the defendant to Williamson Lises or bearer, for one thousand dollars, payable on demand, dated September 24th, 1836, of which he is the holder. The claim was resisted on the ground, that the plaintiff came to the possession of said note, as heir to W. Lises, after its maturity. That the defendant paid, or settled with the payee, during his life,

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for said note; and that, until his death, long accounts existed between him and the defendant, who paid large sums of money for him. The plaintiff gave no evidence of the manner in which the note came to his hands, except his marriage with the payee's only daughter.

There is no evidence of any demand of the amount of the note by the payee, or by the plaintiff, till the commencement of the present suit, which originated about five years after the date of the note. The principal document offered in support of the plea of payment, is a receipt of the defendant to Lisle for \$300, paid to him by the latter, for the travelling expenses of his (Lisle's) daughter. This is the first document excepted to. There is no proof of its having been in the possession of Lisle, and the defendant has not shown, if ever it was in Lisle's possession, how he (the defendant) became possessed of it. This receipt bears date the 11th April, 1838, eighteen months after the date of the note. The other documents being deprived of the signature of the makers, and not connected by any evidence with the note on which this suit is brought, throw very little light on the transaction. There is not the least evidence of any payment, nor of the documents excepted to being at all connected with any transaction, from which it may be inferred that the defendant has made any advances to, or payment for Lisle, which may assist him in establishing the payment of the note, in the whole or in part. The want of demand of payment until the inception of the present suit, cannot avail the defendant. The plaintiff, in our opinion, ought to recover.

It is, therefore, ordered, that the judgment be annulled and reversed, and that the plaintiff recover from the defendant the sum of one thousand dollars, with interest at ten per cent per annum, from the 24th of September, 1836, till paid, with costs in both courts.

Hyams and Dunlap, for the appellant.

Stacy, contra.

ABRAHAM WOMACK v. PETER NICHOLSON.

APPEAL from the District Court of Caddo, *Campbell, J.*

MORPHY, J. This suit is brought to recover the value of a negro woman named Nancy, hired by the plaintiff to the defendant, with damages. It is alleged that, with the knowledge and consent of the latter, one Churchman, his overseer, did so cruelly beat and maltreat the said slave, who was then in a state of pregnancy, as to cause her to be delivered of a child a month or more before the natural time, and that she died some time after of the bad usage and cruel treatment thus received. The answer, after a general denial, avers that, on or about the 16th of March, 1840, the plaintiff hired to the defendant the girl Nancy, representing her to be a good and valuable field hand, and to be humble, tractable, and healthy, but that, in fact, she was wholly worthless, sickly, and unable to perform work as a field hand; that she was insolent, disobedient, and in the habit of running away, when able and well enough to do so; that she was of no use to the defendant, but, on the contrary, was an expense to him from the day he received her on his plantation until she left it, for medicines, medical aid, food, nursing, &c.; that from these causes, and from the loss in his cotton and corn crop, in being deprived of her services by her remaining away, he has been injured to the amount of five hundred dollars, which is pleaded in reconvention. The case was tried before a jury, who gave their verdict in favor of the plaintiff for the sum of \$558. After an ineffectual attempt to obtain a new trial, the defendant has appealed.

Upon an attentive examination of the record, we have not been able to agree entirely with the jury in the conclusion to which they arrived. The evidence shows that the girl Nancy was an insolent and intractable slave, addicted to running away, and that she ran away several times while hired to the defendant. One of the witnesses, a brother-in-law of the plaintiff, says that she was stubborn, and required more whipping than ordinary negroes; that she had been hired before to one Cox, who could not keep her, on account of her vicious and unmanageable character. Shortly after she was on the defendant's plantation, she was discovered to be

unsound and sickly. About the beginning of August, a physician was called in to see her; she exhibited, in his opinion, all the symptoms indicating that she labored under dropsy. Some time after, the girl growing worse, and being of little use to the hirer, Roderick Nicholson, the brother and agent of the defendant, who was then absent from the State, concluded to send her home. A pass was given to her, and the overseer, Churchman, was instructed to dismiss her. The evidence further shows, that the girl was met on her way home by one Metcalf, lying in a very helpless condition, on the side of the road, about two miles from the house of Eppes, to which she was taken in a wagon. She appeared to have been badly beaten, and her head was bruised and swollen. She seemed to be in pain and badly hurt. A midwife was procured, and about three o'clock in the night, she was prematurely delivered of a child. Eppes says, that on the next day he observed her more particularly; that there was a wound on the top of her head, which appeared bruised on one side; that she remained some time at his house, and that he examined her body, which bore marks of the whip—some old, and others new marks; that she got better after the birth of the child; that her body, legs, and ankles were swollen, as well as her face and eyes; that the swelling subsided at one time, but afterwards returned. While at his house she was visited by three physicians. Hardwick, one of them, differed from the two others, as to the situation of the girl. He thought that she was not dropsical, and that her ailment resulted from the treatment she had received, and from her pregnancy and the premature birth of a child; while Burke, who had attended on her before, and Wasson, concur in testifying that she had dropsy in an advanced stage. When she left Eppes' house to be removed to the plaintiff's plantation, she appeared to Hardwick to be convalescent, and her wounds were nearly cured. He gave directions that he should be sent for, in case she grew worse. The evidence further shows, that, after the girl was taken to the plaintiff's plantation, where she remained about two months before she died, no physician was called to attend on her. During this time a good deal of watery matter oozed from her legs; her body, face, and eyes were very much swollen; and she exhibited to the persons around her all the appearances which they had remarked

in persons afflicted with the dropsy. From the whole testimony, it is clear that the plaintiff's slave was most severely whipt and ill-treated, although two of the physicians who examined her were of opinion that the ulcerated appearance of the stripes on her body proceeded from the diseased condition of her skin. It is not shown by whom this whipping was inflicted, nor when, nor where it took place. But even adopting, as we do, the finding of the jury, that it was inflicted by Churchman, the overseer, it is clearly made out to our minds, though it might have caused, and probably did cause, the premature birth of the infant, that the death of the girl, which happened more than three months after, must be attributed to the disease she had before, and which would have occasioned her loss to her master, even without the ill-treatment she received, especially when we take into view the little care and attention extended to her during the time she was at his plantation. Under this view of the case, and the impression made on our minds by the whole testimony taken together, we believe the plaintiff entitled to recover only the expenses incurred by him for nursing, medical aid, &c., during the time she was at Eppes' house, in consequence of her ill-treatment by the defendant's overseer. These expenses appear to amount to one hundred and fifty-eight dollars and fifty cents.

It is therefore ordered that the judgment of the District Court be avoided and reversed; and that the plaintiff do recover of the defendant the sum of one hundred and fifty-eight dollars and fifty cents, with costs below, those of this appeal to be borne by the plaintiff and appellee.

This case was submitted, without argument, by *P. A. Morse* and *Roysdon*, for the appellant. No counsel appeared for the plaintiff.

WILLIAM M. LAMBETH and another v. DAVID BURNLEY.

A claim for conventional interest must be established by written proof. C. C. 2895. Action for the balance of an account, with interest, and verdict and judgment in favor of plaintiffs for a certain sum, without interest, and no new trial applied for by the latter. On an appeal by defendant, and prayer by plaintiffs for an amendment of the judgment, so as to allow the interest claimed: *Held*, that no attempt having been made to correct the judgment in the court below, by moving for a new trial, no amendment can be allowed in the appellate court.

APPEAL from the District Court of Rapides, *King, J.*

O. N. Ogden, for the plaintiffs.

Brent, for the appellant.

MARTIN, J. The defendant is appellant from a judgment, by which the plaintiffs have recovered the balance of an account against him. He complains that he has been allowed only \$1864 78, as the net proceeds of fifty bales of cotton, which he sent to the plaintiffs to be sold for his account, and contends that he is entitled therefor to nearly double that amount. The facts of the case are these: The cotton was sent to the plaintiffs on the 25th of November, 1837, accompanied by a letter, directing them not to sell it, for a short time, for less than twelve and a half cents a pound. The defendant expresses his opinion that the times would soon change for the better. On the 15th of February, 1838, the plaintiffs having been unable to obtain the limited price, wrote to the defendant that they had decided to ship the cotton to Havre, and informing him they would have it valued, and that he might have his choice between the value in New Orleans and the nett proceeds at Havre. This letter was not answered until the 25th of March following, when he requested them to inform him of the valuation they had made of the cotton, and to send him their account. His counsel has urged that he limited them, as to the price at which the cotton was to be sold, and that, having disposed of it for less, they are bound to him for the amount of the limit. The counsel for the plaintiffs has shown that, from November, 1837, to April, 1838, cotton ranged from seven and a half to thirteen cents per pound. In the appraisement which the plaintiffs caused to be made, and which was read without opposition, the

Glasscock v. Havard, Administratrix.

appraisers attest, that they examined samples of the defendant's cotton sent to the plaintiffs in November, 1837, and declare that, between that time and February following, such cotton was worth from eight and three quarters to nine and a quarter cents per pound at the most, and that better cotton was even purchased at eight and three quarters; and, further, that they consider nine cents per pound a fair and liberal price for such cotton, in the month of February, when it was shipped.

It does not appear to us that the plaintiffs acted incorrectly. The defendant's instructions would not have authorized them to hold up the cotton for a long time. In the hope of obtaining the limited price, they held it up for nearly ninety days, which is about one-third of the cotton season. Such was the opinion of the jury. The plaintiffs and appellees have prayed for the amendment of the judgment in their favor, on the ground that the jury erroneously disregarded their claim to interest at the rate of ten per cent, urged in an amended petition. This claim for conventional interest ought to have been established by written proof. The plaintiffs did not apply to the District Court for a new trial, on account of legal interest not having been allowed; and as they did not seek it before the first judge, it is too late to ask it of us.

Judgment affirmed.

DOWNING GLASSCOCK v. ANN JANE HAVARD, Administratrix.

APPEAL from the Court of Probates of Avoyelles, *Baillio*, J.
Cushman and *Waddell*, for the plaintiff.

Edelen, for the appellant.

BULLARD, J. This is an action against the administratrix of the estate of Charles F. Stafford, to recover the price of building a gin house, cotton press, &c., according to contract. The plaintiff recovered a part of his demand, and the defendant has appealed.

The case turned wholly upon questions of fact, and they have been argued in writing at much length in this court. Upon the

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first question, to wit, whether the work had been delivered by the undertaker, and was at the risk of Stafford, at the time it was destroyed, together with a part of the crop, by fire, we concur with the Judge of Probates in the conclusion to which he came, that the loss must fall upon the estate. It is certain that a part of the crop had been ginned, and that the building was under the control of the owner.

As to the other question, whether the plaintiff had performed his contract and to what amount the estate was entitled to a credit, which was decided by the Judge of the Court of Probates, an attentive examination of the evidence, and of the arguments addressed to us, has failed to convince us that the judgment is so clearly erroneous as to make it our duty to interfere.

Judgment affirmed.

ISABELLA MILLIKEN and Husband v. CHARLES N. ROWLEY.

37	253
46	440
37	253
49	971

In an action to recover the undivided half of a tract of land, for the rents and profits from the commencement of defendant's illegal possession, and for a division of the tract, there was a judgment for the plaintiff for the portion of the land claimed, and in favor of defendant for a certain sum for his improvements over and above the amount due by him for rents and profits. The decree ordered a partition of the land. In conformity with the part of the judgment ordering a partition, plaintiff proceeded to have the tract divided, and the respective portions designated by a further decree homologating the proceedings of the notary and experts in making the partition, and ordering himself to be put in possession of the half allotted to him, on paying the amount previously adjudged to be due for the improvements. *Held*, that this was not such an acquiescence on the part of the plaintiff, in the judgment by voluntarily executing it, as is contemplated by art. 567 of the Code of Practico, and will not prevent his appealing from so much thereof as condemns him to pay for the improvements above the rents and profits.

Where the case requires that a judgment should be rendered for the plaintiff, directing him to be put in possession of the land sued for, on paying a sum to the defendant for his improvements, the court will order, at the instance of the latter, that he be authorized to take out execution for the amount decreed to him, if not paid within a certain time.

APPEAL from the District Court of Concordia, *Pierce, J.*

BULLARD, J. The plaintiffs are appellants from a judgment by

which they recovered an undivided half of a tract of land, and were condemned to pay for improvements put upon the land, over and above back rents, \$4583. It was further ordered that no writ of possession should be issued until the plaintiff shall have paid said sum, and that a partition be made of the land between the parties. The defendant moves to dismiss the appeal, on the ground that the plaintiffs acquiesced in the judgment pronounced in the District Court.

The alleged acquiescence consists in having proceeded, in conformity with that part of the judgment which decreed a partition, to partake the land, and to have the portions of each party set forth and designated by a further decree of the same court, homologating the operations and proceedings of the notary and experts in making the partition, and ordering that a writ of possession be issued to put the plaintiffs in possession of the half allotted to them, on their paying, or tendering the above mentioned sum allowed for improvements. It does not appear that the plaintiffs have ever acquiesced in that part of the judgment, which condemns them to pay that amount; and the defendant does not complain, and has not appealed from so much of the judgment as decrees one-half of the land to the plaintiffs. This is not in our opinion such an acquiescence in the judgment, by executing it voluntarily, as is contemplated by art. 567 of the Code of Practice. The motion is overruled.

The appellants complain only of that part of the judgment which allows so large a sum for improvements, and as not making proper deduction for fruits; and they contend that it is not authorized either by law, or the evidence in the record.

It appears that, at the time of the probate sale of the land, there was a small clearing of about forty acres, and that at this time there are about three hundred acres under fence, a part entirely cleared, and a part only imperfectly cleared, but so as to be cultivated. The testimony, as usual, varies as to the cost of clearing. It depends upon the degree of improvement, from the entire destruction of the timber on the land, to a mere girdling or deadening of the larger trees, and cutting down and burning of the undergrowth, so as to be able to cultivate the land. Some of the witnesses fix the value of the highest degree of clearing as high as

\$100 per acre, and the mere deadening at five dollars. After weighing all the evidence in the case, upon this point, it appears to us that the land has been enhanced in value by the clearing, at the rate of twenty-five dollars per acre, that is to say, for the 260 acres cleared since the sale, \$6500, for one-half of which the plaintiffs ought to account. On the other hand the defendant is to account for one-half of the fruits, or rents and profits of the land. It is clearly shown that the rent of the land for the last three years has been worth \$1500, per annum, equal to \$4500, without inquiring whether the defendant be not liable, as a possessor in bad faith before the inception of this suit. The plaintiffs are entitled to one-half of that sum, leaving a balance in favor of the improvements of \$2000, one half of which, to wit, \$1000, is chargeable to the plaintiffs.

The appellee has prayed that the judgment may be so amended as to fix a day after which he shall be entitled to an execution, if the sum recovered by him in reconvention be not paid. This we think he has a right to, because he is not bound always to remain in a state of suspense; and this has been settled in several cases in this court. See *Fletcher et al. v. Cavalier et al.* 2 La. 267. 14 Ib. 548. *Black v. Catlett and others*, 1 Robinson, 540.

It is therefore ordered and decreed, that the judgment of the District Court, so far as it decrees to the plaintiffs one undivided half of the tract of land, and so far as it homologates the partition of the land between the parties, be affirmed; and that it be reversed, so far as it allows to the defendant, in reconvention, the sum of \$4583; and it is ordered that the defendant do recover of the plaintiffs \$1000; that no writ of possession be issued until said sum shall have been paid or tendered; and that, if not paid or tendered within sixty days from the notice of this judgment, the defendant may issue execution for the same. And it is further ordered that the appellee pay the costs of the appeal.

Stacy, for the appellants.

Dunbar, for the defendant.

ISAAC THOMAS v. JOHN B. SCOTT.

Where real property is purchased by a commercial firm, the members of the firm become joint owners thereof; and it cannot be alienated by one partner, without the consent of the rest. C. C. 2796. But where the latter, by receiving a portion of the price, subsequently ratify a sale by the former, they will be estopped from asserting any title to the prejudice of a *bona fide* purchaser.

Partners cannot plead ignorance of the transactions of their house.

The act of receiving the whole or a part of the proceeds of property, sold without authority, amounts to a ratification of the sale, and will preclude the owner from disturbing the purchaser.

Though the legal title to real property bought by a commercial firm, be in the members individually, each holding an undivided share, the value thereof belongs to the partnership; and a partner, after disposing of his interest therein, cannot avail himself of his legal title to sue for a partition.

APPEAL from the District Court of Rapides, *King, J.*

Flint, for the appellant.

Brent, contra.

MORPHY, J. This a petitory action by which the plaintiff seeks to recover an undivided half of a piece of ground in the town of Alexandria. He alleges that the mercantile firm of John C. Pryor & Co., which was composed of John C. Pryor and himself, purchased the said property at the sale of the succession of John P. Randolph; that on the 6th of February, 1830, while he was absent from the parish of Rapides in the discharge of official duties, his partner, John C. Pryor, pretending to act in the name of the firm, but without any authority to so do, made a conveyance of the lot of ground to F. M. LaFerrière Levesque, since which time, under sundry mesne conveyances, the same has come into the possession of the defendant, John B. Scott, who now claims to be owner of the whole of it. The defendant pleaded the general issue, and called in his vendor Wm. P. Scott. The several vendors of the premises were successively cited in warranty, until LaFerrière Levesque appeared to defend the suit. After a general denial he averred that the plaintiff authorized and approved of the sale made to him by J. C. Pryor & Co., and derived a direct profit and advantage from it, as debts, for which he was with others bound *in solido*, have been discharged and paid with the purchase money; and that, moreover, the plaintiff has since, in divers ways,

31	256
44	53
44	452
31	256
47	96
47	353

Thomas v. Scott.

and by divers acts, ratified the said sale. The defendant averred, further, that after the purchase, he had made improvements on the property to the amount of \$10,000 ; and prayed, should the court decide that the plaintiff is entitled to one undivided half of the property, that he may be decreed to reimburse at least one-half of the purchase money and of the improvements. There was a judgment below in favor of the defendant, and the plaintiff has appealed.

This court has held that, if real property be purchased by a commercial firm, the several members of it become joint owners of the property thus acquired. It follows, as a corollary, that one partner cannot afterwards alienate it, without the consent of the other partners. Civ. Code, art. 2796. 1 Mart. N. S. 290. 4 La. 397. The only question then is, whether, in this case, there are any circumstances which should preclude the plaintiff from recovering.

The record shows that the sale to LaFerrière Levesque, by the firm of J. C. Pryor & Co., was made for and in consideration of one thousand dollars, payable as follows : \$316 44 in cash, and the balance, being \$683 56, in a draft at four months from the 6th of February, 1830, drawn by the purchaser on the house of J. Hagan & Co., of New Orleans. James Armor, whose testimony was taken under a commission directed to New Orleans, testifies that he was the commission merchant and agent of the plaintiff, and, also, of the house of John C. Pryor & Co. of Alexandria, in 1830 ; that he received the draft described in the sale to LaFerrière Levesque on J. Hagan & Co. ; that the said draft was paid at maturity ; and that he passed the proceeds to the credit of John C. Pryor & Co., and afterwards accounted therefor in his settlement with the plaintiff himself. This witness says that the plaintiff may have mentioned to him that the draft had been given in payment of property in Alexandria, sold by the firm of John C. Pryor & Co. to LaFerrière Levesque, but that he does not recollect it. It further appears in evidence, that the sale to the defendant was recorded in the parish of Rapides, on the 6th of February, 1830, and the present action was brought only on the 14th of May, 1835. These facts appear to us sufficient to estop the plaintiff. It cannot be supposed, when the proceeds of this draft were either paid,

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or accounted for to him, that he was uninformed of the object for which it had been given. The partners of a firm cannot plead ignorance of its transactions. The books of the concern must, at all events, have acquainted the plaintiff with the origin of this draft, even were we to admit that his absence from the parish, at the time of the sale, prevented him from knowing it then. There is no principle better settled in our jurisprudence, than that the act of receiving the whole or a part of the proceeds of property, sold without authority, amounts to a ratification of the sale, and precludes the owner from disturbing the purchaser. In the case of *Baca v. Ramos et al.* 10 La. 420, we held, that when a commercial firm buys real property, although the legal title to it be in the members of the firm, and each holds an undivided share or interest in it, yet the value thereof belongs to the partnership, which has an equitable title to it ; and that one partner, after parting with all his interest in it for a given sum, has no right to avail himself of his legal title to sue for a partition. So, in the present case, the plaintiff, after receiving his proportion of the value of the property which belonged to the firm, cannot now be permitted to urge his legal title to the prejudice of a *bona fide* purchaser, who has paid the value to the firm.

Judgment affirmed.

GRANVILLE P. SMITH, Administrator, v. JOSEPH J. SCOTT and another.

A surety who binds himself with his principal, *in solido*, is not entitled to the benefit of discussion ; and may be sued alone for the whole debt. His obligation must be regulated by the principles applicable to debtors *in solido*. C. C. 3014.

Pleas in compensation must be set forth with the same certainty as to amount, dates, &c, as would be necessary if the party setting them up were the plaintiff in a direct action. General allegations will not suffice.

To entitle a defendant to a trial by jury, under the 24th section of the act of 20th March, 1839, he must show, by his affidavit, that his means of defence are certain and unequivocal, and that they will affect the plaintiff's right to recover.

APPEAL from the District Court of Rapides, King, J.

Smith, Administrator, v. Scott and another.

Brent and O. N. Ogden, for the plaintiff.

Hyams, for the appellant.

SIMON J. The defendant, Hawkins, is appellant from a judgment condemning him to pay the amount of sundry promissory notes, subscribed by him as the security, *in solido*, of his co-defendant Scott, which notes were given by Scott for the price of several slaves, purchased by him at the sale of the property belonging to the succession administered by the plaintiff.

The pleadings show that the defendants filed their answer on the 19th of May, 1841, in which they pleaded the general issue; that on the 31st of the same month, the plaintiff filed a *remittitur*, in which he acknowledges that the defendants are entitled to two credits, amounting together to \$5500, paid at two different periods; and that on the same day, the defendants obtained leave to file an amended answer, in which they state that *large payments have been made* upon the notes sued on, which are not credited thereon. They pray for a trial by jury; and the affidavit of Scott in support of the prayer, alleging that the allegations set forth in the amended answer are true, is thereto annexed.

The case was called for trial, but the jury having been previously discharged, the judge *a quo* continued it with regard to the defendant Scott, and ordered it to be tried as to the defendant Hawkins; whereupon Hawkins took a bill of exceptions to the opinion of the court ruling him to trial, without giving him the benefit of a trial by jury. There was judgment in favor of the plaintiff.

The only question which this case presents, arises out of the bill of exceptions. It is contended that the affidavit made by Scott ought to enure to the benefit of his co-defendant; that Hawkins, being sued as Scott's security, had a great interest that judgment should not be rendered against him before it was rendered against the principal debtor, particularly as compensation and payment had been pleaded; and that the defendant Hawkins had a right to avail himself of the pleas, which were to be inquired into by a jury.

It is clear that the defendant Hawkins, having obligated himself, and being sued as the security, *in solido*, of his co-defendant, was not entitled to the plea of discussion; and that the effect of his engagement was to be regulated by the same principles which

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are by law established for debtors *in solido*. In such a case, he might have been sued alone for the whole amount of the debt (Civ. Code, art. 3014); and judgment could have been legally rendered against him, in the absence of his co-debtor or principal obligor.

It is true that the answer was filed by both defendants together; but the allegations of compensation or payments by them relied on in their answer, are not such as to entitle them even to produce evidence in support of the pleas. In the case of *White v. Moreno*, 17 La. 372, we held that pleas in compensation should be set forth with the same certainty, as to amount, dates, &c. &c., as if the party opposing them were himself plaintiff in a direct action. General allegations do not suffice. For aught that appears, we should be disposed to believe that the pleas of compensation and payment opposed by the defendants, relate to the sums for which a *remittitur* was filed by the plaintiff; as their answer does not inform us that they paid any other sum, at any other time.

But it is urged that the case should have been tried by jury. We think not; for, supposing the defendant Hawkins to have signed the affidavit, his allegations are too loose to be within the meaning and object of the act of the 20th of March, 1839. In the case of *Amado v. Breda*, 16 La. 258, we said, that to entitle a party to a trial by jury, under the provisions of that act, he must show, in his affidavit, that his means of defence are certain and unequivocal, and that the facts sworn to by him, are so stated in his answer as to show clearly that they would affect the plaintiff's right of recovery. At all events, as we said in the case above quoted, the defendant Hawkins might have tried his pleas before the court as well as before a jury, and, not having availed himself of them, we are induced to presume that they could not be substantiated.

This case, however, is not such, in our opinion, as to entitle the plaintiff to the damages by him prayed for in his answer, as for a frivolous appeal.

Judgment affirmed.

Manadue, Administrator, v. Kitchen and others.

WARREN H. MANADUE, Administrator, v. WILLIAM H. KITCHEN
and others.

The certificate of a notary that "he left the notice of protest at the domicile of the endorser," is sufficient. It is not necessary that it should show whether he delivered the notice to one in the house, or simply left it there, as a notice either way is good.

Notice to one who resides in a place where the protest was made, must be served personally, or by leaving it at his residence or place of business.

• APPEAL from the District Court of Rapides, *King, J.*

Brent, for the plaintiff.

Hyams, for the appellant.

MORPHY, J. This is an action against the endorsers of several promissory notes. Judgment having been rendered against them, *in solido*, Joseph M. Sollibellas, one of the endorsers, has appealed.

Want of notice to the endorser is the only point made in this court. The notary says in his certificate that, "notice in writing of this protest was left by me at the domicile of Joseph M. Sollibellas, in the upper suburb of Alexandria, on the 21st day of February, 1840, he being absent," &c. This is said to be insufficient notice, as it does not appear from the notary's certificate, nor from any evidence adduced on the trial below, that the house was shut up, or, if open and inhabited, that he left it with any one in the house. The language used by the notary clearly implies, we should think, that he found the house open, for if it had been shut, he could not have left the notice at the domicile of the endorser, which we understand to mean, in the house where he resides. When the notary meets any one at the domicile, or in the house of the endorser, whom he wishes to notify, it is customary and, perhaps, proper, for him to mention that he delivered the notice to that person, although it suffices, we think, to mention, as has been done in this case, that he left the notice at the endorser's domicile; the latter expression leaves it doubtful, to be sure, whether he delivered the notice to some person in the house, or whether, finding nobody there, he placed it on a desk or table in the house. In the case of *The Bank of the U. S. v. Merle and others*, 2 Robinson,

Short, Administratrix, and another v. Piety and others.

117, we held, that a notice given either way, or left in the hands of a slave in the house, would be good. We are not aware, nor has it been satisfactorily shown that this decision is at variance with the adjudications on the subject, made either here, or elsewhere. We believe the well settled law to be, that when a person resides in the place where a protest is made, the notice to him must be personal, or left at his residence or place of business. Bailey on Bills, p. 277. 6 La. 727. 15 La. 51, 113, 115, 544.

The appellee has prayed for damages. We do not grant any, as the earnestness with which the appellant's counsel has pressed upon us his views on the subject, induces us to believe that he had some faith in the point he has made. The notes, moreover, bear already interest at ten per cent per annum.

Judgment affirmed.

ANN C. SHORT, Administratrix, and another v. ROBERT D. PIETY and others.

APPEAL from the District Court of Catahoula, *Boyce, J.*

MORPHY, J. This is an action brought against the maker and endorsers of several promissory notes, given by the maker, R. D. Piety, in payment of property purchased at the probate sale of the succession of Marcus L. Short. There was a verdict and judgment below in favor of the plaintiffs against the maker, but the endorsers were discharged. R. D. Piety has alone appealed.

As the endorsers have not been made parties to this appeal, it is unnecessary to notice the facts in relation to them, or the grounds on which they have been released. The maker and appellant urges, that the notes sued on were given for a house and lot in the town of Harrisburg, which was sold by the Probate Judge as the property of the succession of Marcus L. Short, while in fact the house was owned in co-partnership between the deceased and James W. McDonald, one of the plaintiffs in this suit. That the property was illegally sold, without any application or petition having been presented to the Court of Probates by any person legally authorized to demand a sale, and without any

Short, Administratrix, and another v. Piety and others.

order of that court directing the sale to be made. The appellant further urges, that when he became the purchaser of the property offered for sale, he believed the same to be free from mortgage or any incumbrance whatever, whereas there was a mortgage existing thereon to a large amount, to wit, the sum of six thousand seven hundred and fifty dollars, in favor of Michael H. Dasson, vendor of said Short and McDonald, who still holds the mortgage to secure the payment of the purchase money, the whole of which is yet due to him. The evidence in the record fully substantiates each and every one of the grounds relied on by the appellant. It is clear that the sale made by the Judge of Probates is an absolute nullity, and conveys no title whatever to the purchaser. It is equally clear that, even had the sale been made in strict accordance with law, as to the moiety of the property belonging to the estate of Marcus L. Short, it could not have had the effect of releasing the mortgage on the other half owned by McDonald, which was not judicially sold. Situated as the property was, the parties should perhaps have resorted to an action of partition between the estate of Short, and his surviving partner, McDonald. By that means the whole of the property would have been the object of a judicial sale, and a good title could have been made to the purchaser. Civ. Code, arts. 334, 335, 336, 1128, *et seq.* The evidence shows, however, that Piety took possession of the house, and kept a tavern in it after the sale. It is said that he has not offered to give it up, and that he cannot keep the property, and, at the same time, refuse to pay for it. This is true. But the evidence does not show, on the other hand, that possession of the premises was asked of him, accompanied with an offer to return his notes, and release him from all liability. He cannot be bound to pay notes, the consideration of which has totally failed.

It is, therefore, ordered, that the judgment of the District Court be reversed, and that ours be for the defendant R. D. Piety, with costs in both courts; reserving to the plaintiffs their right to sue for the possession of the property, if it be withheld, and all claims they may have against the appellant for the use and enjoyment he has had of it, from the time of the sale.

McGuire and Ray, for the plaintiffs.

Phelps, for the appellant.

ALVAREZ FISK v. SAMUEL FRIEND, Executor.

The signature of the appellant is not necessary to the appeal bond. His obligation to discharge any judgment rendered against him on the appeal, results from the judgment itself.

The provision of art. 984 of the Code of Practice, requiring the holder of any claim for money against a succession to present it to the curator or executor before commencing an action, is like the amicable demand to be made of a debtor before suit. Its omission may prevent the recovery of costs, but not that of the debt itself.

APPEAL from the Court of Probates of Claiborne, *Peets, J.*

MARTIN, J. The defendant was sued on a judgment rendered, in Mississippi, against his testator, and pleaded the general issue. There was judgment as in case of nonsuit, and the plaintiff has appealed. The defendant prays for the dismissal of the appeal, on the ground that the bond is not signed by the appellant, nor by any person for him, and is not executed in conformity with the order of the judge. The bond appears to be signed by D. L. Evans, for the appellant, as his attorney. We have held that the signature of the appellant is not necessary to the regularity of the appeal; for his obligation to discharge any judgment rendered against him on the appeal results from the judgment itself, and need not be fortified by the weaker one resulting from the bond, which appears, in the present case, to be in perfect conformity with the judge's order. The appeal must, therefore, be sustained.

On the merits, the plaintiff introduced the transcript of a record and judgment obtained by him against the defendant's testator, in the State of Mississippi. The suit was brought on a promissory note, and establishes the plaintiff's claim.

It has been contended, in this court, that judgment of nonsuit was correctly given against him, because he brought the present suit without having first submitted his claim to the executor for his approbation. The application to the executor for this purpose, is like the amicable demand to be made of the debtor before suit be brought. The want of it ought not to prevent the recovery of the claim, although it may prevent that of the costs.

It is, therefore, ordered, that the judgment be annulled, and that the plaintiff recover from the defendant the sum of two thousand

 Briggs and others v. Spencer.

eight hundred and sixty-four dollars and fifty-two cents, with interest at the rate of eight per cent per annum, according to the laws of the State of Mississippi, from the 6th of October, 1840, with costs, in this court, and that he pay those in the court below.

This case was submitted, without argument, by *Evans* and *Roysdon*, for the appellant, and *Brent* and *Downs*, for the defendant.

CHARLES BRIGGS and others v. JOHN T. SPENCER.

By the laws of Mississippi, the forfeiture of a forthcoming bond extinguishes the original judgment; and the forfeited bond itself acquires the force and effect of a new judgment.

In an action on a judgment obtained in Mississippi, defendant having established that the judgment had been extinguished, by the execution and forfeiture of a forthcoming bond: *Held*, that there must be judgment as in case of nonsuit.

Where, by the laws of a State in which a judgment has been obtained, no execution can be issued against the property of the defendant for a certain period, plaintiffs cannot, by suing on the judgment here, proceed against his property in this State, before the expiration of the delay to which defendant had acquired a right. The judgment cannot have a greater effect extra-territorially, than in the State in which it was rendered.

APPEAL from the District Court of Concordia, *Curry, J.*

SIMON, J. This is a suit by attachment. The plaintiffs represent, that the defendant owes them a sum of \$9507 65, with eight per cent interest, and another small sum without interest, being together the amount of a judgment by them obtained against their debtor in the Circuit Court of Scott county, in the State of Mississippi; that the claim has acquired the force of *res judicata*; and that by the laws of the State where the judgment was rendered, the defendant is bound to pay the whole of the judgment, although it should appear to be a several judgment against him and others. On the day previous to the filing of the petition, (5th of January, 1841,) the plaintiffs filed their affidavit and bond according to the 4th section of the act of the 25th of March, 1828, whereupon a writ of attachment was issued, and levied on the

same day upon a number of slaves and other property, stated in the inventory returned by the sheriff.

The defendant admits the judgment declared upon in the plaintiffs' petition, but denies its effect as one *in solido*; he further states that, under the laws of Mississippi, the same was legally satisfied, extinguished, novated, and paid, previous to the institution of this suit; that the slaves attached were in his (defendant's) peaceable possession in the city of Natchez, but that the plaintiffs secretly and tortiously procured said slaves and other property attached to be removed out of the State of Mississippi, without his knowledge and consent, &c. He denies being indebted to the plaintiffs on account of the judgment, and prays that their demand may be rejected with damages, and costs.

Eleven months after the filing of the defendant's answer, the plaintiffs obtained leave to file an amended petition, in which they state certain facts which they aver were not known to them at the time of the institution of this suit, to wit, that a writ of *fi. fa.* was issued by virtue of the judgment declared upon in the original petition, and was levied upon twelve slaves belonging to the defendant, for which the latter executed a bond, called a forthcoming bond, dated the 5th of August, 1839, (previous to the institution of this suit,) and that said slaves were not surrendered according to the conditions of the bond, nor the amount of the execution paid, by reason whereof the bond was returned as forfeited, which bond, so forfeited, has the force and effect of a judgment for the amount of the execution for which the bond was given. That a writ of *fi. fa.* was subsequently issued on said bond, and levied upon certain lands belonging to one of the debtors, which lands were offered for sale, and not sold in consequence of a valuation having been claimed, and two-thirds thereof not having been bid in cash. That, subsequently, another writ was issued, and levied upon other tracts of land, which, not having been sold, were also left in the possession of the debtors. But that on the 16th of August, 1841, (after this suit was instituted,) an *alias fi. fa.* was issued, and levied upon all the said tracts of land, which, having been sold, produced a sum of \$825, a part of which, to wit, the sum of \$694 91, is to be credited upon the

amount of the execution, leaving the balance due to the petitioners. Wherefore the plaintiffs pray that the facts by them alleged be taken and considered as a part of, and in connection with their original petition, and that they have judgment accordingly.

The filing of this amended or supplemental petition was objected to by the defendant's counsel, on the grounds that it was setting up a cause of action which arose after the suing out of the attachment, and even after issue joined ; but these objections were overruled by the lower court, which permitted it to be filed, and the defendant took a bill of exceptions.

The plaintiffs' supplemental petition was answered by the defendant, by setting up the same matters alleged in his original answer. He further states, however, that, at the time this suit was instituted, the plaintiffs had no cause of action against him, since the judgment declared upon in their original petition, was, under the laws of Mississippi, satisfied, paid, novated, and extinguished.

During the progress of the suit, a motion was made by the defendant's counsel to dissolve the attachment, on the ground of certain informalities existing in the proceedings, which motion was overruled by the District Court ; and the case having been tried on its merits, judgment was rendered in favor of the plaintiffs, from which judgment, after a useless attempt to obtain a new trial, the defendant has appealed.

From the view we have taken of the question relative to the plaintiffs' right of action, at the time this suit was instituted, we have deemed it unnecessary to examine and express any opinion on the points raised by the bills of exception above mentioned, in relation to the motion made to dissolve the attachment, and to the leave granted by the court to the plaintiffs to file a supplemental petition ; for if, from the plaintiffs' own showing in their two petitions, it appears that they could not legally resort to the extraordinary remedy which they have thought proper to exercise, it is clear that the proceedings had in this suit must be set aside, and the plaintiffs nonsuited.

The evidence shows that the plaintiffs' judgment was obtained as alleged in their original petition ; that the other and subsequent proceedings, stated in their supplemental or amended petition, took place as represented ; that a forthcoming bond was taken,

which was subsequently forfeited ; and that the several executions or writs of *feri facias* therein mentioned, were really issued and levied as therein set forth, and that the tracts of land, seized by virtue of the forthcoming bond or writs of *fi. fa.* issued thereon, were definitively sold, after the expiration of twelve months from the first seizures, which had taken place in April and May, 1840. These last proceedings took place about seven months after this suit was instituted.

The testimony of the witnesses examined on the trial of this cause, establishes that, under the laws of Mississippi, the giving of a forthcoming bond is a satisfaction of the prior judgment, if the bond be forfeited, and that the prior judgment will be extinguished by the return of the forthcoming bond as forfeited. This is also shown or corroborated by the fact, that the subsequent execution issued not upon the old judgment, but upon the new one arising from the forfeiture of the bond.

By a statute of Mississippi produced in evidence and found in the record, it is enacted, sect. 3, "that it shall be the duty of the sheriff, &c., to proceed to offer at public sale to the highest bidder, &c., the property so levied on or surrendered, and should the same not sell for two-thirds of its appraised value, the sheriff shall announce that there is no sale, and such sheriff shall return, &c., that the property offered would not sell for two-thirds of the appraised value, and *thereafter no other writ of execution or other process for the sale of such unsold appraised property shall issue, until the expiration of twelve months from the time when such writ of execution shall have been returned as hereinbefore required.*"

It seems to us clear that, in the State of Mississippi, the forfeiture of a forthcoming bond extinguishes or satisfies the original judgment, and is in itself of equal dignity with a judgment. It assumes a new character, and, as a second judgment, has the same force and effect ; and the plaintiff cannot then proceed to enforce the first, but must rely upon the second. 1 Howard, 64, 98. 3 Ib. 26, 61, 419. 4 Ib. 351. If so, the judgment declared upon in the plaintiffs' original petition was extinguished, and could not be made the basis of the present action. This alone would, perhaps, be sufficient to defeat the plaintiffs' alleged rights, and to

annul all the proceedings had upon the attachment issued at their request.

But the plaintiffs in their amended petition show, that executions having issued on the forfeited bond by virtue of its effect as a new judgment, property was seized and offered for sale, and that it could not be sold for two-thirds of the valuation. Then there was no sale; and the debtor became entitled to keep the property for twelve months, before the expiration of which, no proceeding in execution, or other process, could be had or carried on against his property. Surely, it cannot be contended that a judgment should have a greater extra-territorial effect, than it would have in the State where it was rendered. The delay of twelve months, during which all proceedings were to be suspended, was a right acquired by the defendant under the laws of Mississippi, and we are not ready to say that he could be deprived of it by proceedings had against his property in another State. The plaintiffs could not act against him in Mississippi; they were precluded from enforcing their judgment there, before the expiration of one year; and the fact that they did so about *seven months* after this suit had been instituted, shows conclusively, that when they resorted to the proceedings complained of, they had no right of action. The attachment was, in our opinion, prematurely sued out, and the action must be dismissed.

It is therefore ordered, that the judgment of the District Court be annulled and reversed; and that ours be in favor of the defendant as in case of a nonsuit, with costs in both courts.

Stacy, for the plaintiffs.

F. H. Farrar and *T. P. Farrar*, for the appellant.

Burney and Husband v. Brown, Tutor, and another.

IRENE BURNEY and Husband v. JOHN BROWN, Tutor, and another:

In an action, on an open account, against the heirs amongst whom a succession has been partitioned, for articles furnished to their ancestor, interest will be allowed from judicial demand, and not from the death of the ancestor.

APPEAL from the District Court of Rapides, *King, J.*

MARTIN, J. The plaintiffs claim from the defendants the value of eighty thousand bricks, and the rent of fifty-nine acres of land, amounting, according to an account annexed to the petition, to \$1255. The defendants pleaded the general issue, and prescription. There was judgment against them for \$900, with interest at the rate of five per cent per annum; and they have appealed. It is contended, on the part of the defendants, that the plaintiffs' claim for bricks was properly reduced to one for forty thousand, as in a suit formerly brought in the Court of Probates, they had claimed payment for the latter quantity only, and there is some evidence that no greater quantity was delivered. It is also urged that the court erred in allowing interest, the suit having been brought against the heirs in the District Court, after a partition of the succession among them.

There is an admission in the record that no judicial claim was made of the rent, until the inception of the suit in the Court of Probates, in January, 1839. The claim is for rent in 1832. Admitting that it began on the last day of that year, it expired on the same day in the year 1833, when the prescription began to run, and was acquired on the last day of the year 1836. The suit in the Court of Probates was not brought until several years afterwards, to wit, in January, 1839.

The plaintiffs, therefore, had no legal claim except for the bricks. The court sustained it for eighty thousand bricks, at \$10 per thousand, and gave judgment for \$800. We think that it erred, and that forty thousand bricks only were proved to have been delivered. The interest was improperly allowed from the first of January, 1834, the period of the death of the defendants' ancestor. Under the Code of Practice, it ought to have been allowed from the inception of the suit in the Court of Probates.

It is, therefore, ordered, that the judgment be annulled and

Grove v. Harvey and another.

reversed, and that the plaintiffs recover from the heirs the sum of four hundred dollars, with interest at the rate of five per cent per annum from the 15th of April, 1839, until paid, each of them paying his virile part thereof, to wit, John Brown, tutor to the minor Joseph Brown, the sum of one hundred and thirty-three dollars and thirty-three and a third cents, with interest aforesaid; the said Brown as tutor of the minor Clarissa Brown, the sum of one hundred and thirty-three dollars and thirty-three and a third cents, with interest as aforesaid; and Dicy Brown, the wife of V. F. Cotton, the sum of one hundred and thirty-three dollars and thirty-three and a third cents, with interest as aforesaid. The costs of the appeal to be born by the plaintiffs, and those of the court below by the defendants *in solido*.

Brent, for the plaintiffs.

Hyams, for the appellants,

WILLIAM BARRY GROVE v. WILLIAM HARVEY and another.

Failure to serve citation of appeal in due time, will authorize the appellee to delay his answer until the expiration of the period allowed him by law, or, perhaps, to require a new citation, but not to demand the dismissal of the appeal.

APPEAL from the District Court of Madison, *Tenney, J.*

MARTIN, J. The defendant and appellee, Harvey, claims the dismissal of the appeal, on the following ground: that the appeal was granted on the 5th of September, 1841, and no appeal bond given until the 25th, and the citation only served on the 29th, but five days before the first Monday of October, the return day, although the appellee dwells in the parish of Madison, at the distance of one hundred and fifty miles from Alexandria, where the Supreme Court sits, when, according to law, the citation ought to have been served twenty-five days before the return day. The Code of Practice, article 583, requires that when there is not sufficient time between the granting of the appeal and the next term of the Supreme Court, the appeal shall be made returnable to the succeeding term. In the present case, there were more than twenty-five days between the 5th of September and the first Mon-

day of October. Therefore, the appeal was correctly made returnable on the latter day.

It is true that the citation was not served until the 29th of September. The appellee may, indeed, complain that the citation was not served in due time; but this does not authorize him to demand the dismissal of the appeal, but only to delay his answer in this court until the expiration of the time allowed him by law, or perhaps to require a new citation; but this he has not done.

The plaintiff is appellant from a judgment dismissing the attachment by which he commenced the present suit. The dismissal of the attachment was asked on the ground, that the order authorizing it was a nullity, having been made on the 5th of February, 1840, while the affidavit and bond were not executed until the 24th and 25th of the same month. The authority of the attorney in fact who made the affidavit, and executed the bond for the plaintiff, was also denied. The plaintiff and appellant shows that, although the order for the attachment bears date the 5th of February, 1840, it was made after the petition and affidavit were filed, for the order is on the back of the petition. The affidavit bears date the 24th of February, and the bond the 25th.

It is more than probable that the order was made on the day following the filing of the petition, and on the day on which the bond was executed, and that the date of the 25th was intended, the figure 2 being, by a *lapsus calami*, omitted before the figure 5.

The plaintiff and appellant offered witnesses to prove the day on which the order was granted. The court having dissolved the attachment on the first ground, forbore to act on the second, and did not allow the plaintiff an opportunity of proving that the person who made the affidavit and executed the bond for him, had his authority to do so. In this, in our opinion, it erred. The plaintiff has an undoubted right to make such proof.

It is, therefore, ordered and decreed, that the judgment be annulled, and that the case be remanded for further proceedings according to law; the defendant and appellee paying the costs in this court.

Bemiss, for the appellant.

Stacy, contra.

JAMES MORRISON v. PHILIP CROOKS.

An injunction will not lie, to stay the execution of a judgment for the amount of a note given for the price of a tract of land, on the allegation that, since the rendering of the judgment, plaintiff has discovered that the defendant, his vendor, had no title to the land. The execution can only be resisted by appeal, or action of nullity, or on an allegation of extinguishment by payment, release, confusion, novation, or other legal mode.

APPEAL from the District Court of Rapides, *Boyce, J.*
Hyams, for the appellant.

Brent, contra.

MARTIN, J. The plaintiff is appellant from a judgment dissolving an injunction, which he had obtained on the following grounds : That the defendant had obtained a judgment against him on a note of hand, given as the consideration for the sale of a tract of land, purchased by him from the defendant ; that an execution had been issued thereon, &c. ; that, since the rendition of the judgment, the plaintiff has discovered that the defendant had no title or claim to the land so sold ; and that one *Mason* is in possession of it, and has a good title thereto. The defendant claimed the dissolution of the injunction, on the grounds : *First*, that the plaintiff's own statement shows that he is not entitled to the relief sought. *Second*, that the matter urged by him now, might have been pleaded in the suit in which the judgment enjoined was rendered. *Third*, that he seeks to arrest the execution of a judgment which he does not allege that he has paid, which was rendered by a competent court, and is not attacked on the grounds of error or fraud, nor sought to be rescinded and annulled. It does not appear to us that the court erred. The defendant's claim against the plaintiff is *res judicata* ; or, at least, his execution cannot be resisted otherwise than by an appeal, or action of nullity, or on an allegation that the claim has been extinguished by payment, release, confusion, novation, or other legal mode of extinguishment.

Judgment affirmed.

MARGARET TOLLETT, Tutrix, v. ANDREW JONES.

Where the certificate of the magistrate, to whom a commission was addressed, attests that the witness appeared and answered the interrogatories, and signed his name thereto "after having been examined upon the Holy Evangelist of Almighty God," it will be sufficient. The language of such a certificate is immaterial, provided it appear clearly that the requisites of the law have been complied with.

The object of the 7th sect. of the act of 25th March, 1828, which requires that interrogatories to be propounded to witnesses examined under commission, shall be served on the opposite party or his counsel, three days previous to being forwarded, is to afford the latter sufficient time to examine them, and prepare his objections or cross-interrogatories; and where such interrogatories have been handed to a party, with a request that he will accept service thereof and return them the next day, and he acknowledges service, and returns them, accordingly, with his cross-interrogatories, he will be considered as having waived any further delay.

APPEAL from the District Court of Claiborne, *Campbell J.*

MORPHY, J. This is an action brought by the grandmother and tutrix of the minor children of Marcus Jones, to recover a slave alleged to be the property of their father. The petitioner avers that the defendant has had the care and keeping of the said children for some time, by the common consent of their relations, and with the mutual understanding that he was to provide for their support and education, and that, in consideration thereof, he was to have the services of the said slave; but that the defendant has entirely failed to make a reasonable provision for the support and comfort of the children, has neglected their education, and has so ill-treated them that they have been compelled to abandon his house. The defendant, after a general denial, avers that the heirs of Marcus Jones, have no right or title to the slave, and pleads prescription. He further avers, that he has had the minors in his house, and has provided them with board, clothing, and every comfort of life for five years, and has paid for their tuition, and furnished them with books, stationery, &c.; that for these, and divers other expenses, the minors are indebted to him in the sum of \$2350, which he pleads in compensation and reconvention. There was a verdict and judgment in favor of the defendant,* and the plaintiff has appealed.

The testimony in this case is extremely vague, contradictory,

* The jury found that the defendant was not entitled to recover any damages.

and inconclusive, and were we called upon to pass on the merits, we should find it difficult to come to a satisfactory conclusion ; but a bill of exceptions presented by the record, makes it our duty to remand the case for a new trial, and this will afford the parties an opportunity of introducing additional evidence in support of their respective pretensions.

On the trial, the plaintiffs offered in evidence, testimony taken under a commission executed in the county of Hempstead, in the State of Arkansas. It was objected to by the defendant's counsel, on the grounds : *First*, That there was no *jurat* to the return of the commission. *Secondly*, That there was no legal service of the interrogatories on the defendant, or his counsel, three days previous to their being forwarded.

We have examined the certificate of the magistrate who executed the commission, and it appears to us to contain, in substance, all that can be required. The witness appeared, answered the interrogatories annexed to the commission, and signed his answers after having been *examined upon the Holy Evangelist of Almighty God*. The words of such a certificate do not appear to us material, provided it clearly appear from it that the requisites of the law have been complied with. 9 La. 424. In relation to the interrogatories, the record shows that the counsel for the defendant accepted service of them on the 21st of August, 1841. One of the defendant's counsel, who was examined at the request of the plaintiff's attorney, testified that the interrogatories were handed to him on the 20th of August, by the latter, with a request that they should be returned the next day ; that he acknowledged service of them on the 21st of August, and returned them to the clerk on that day ; and that he had the interrogatories in his possession as long as he wanted them. It appears, further, that on the 21st, the defendant's counsel filed objections to almost every one of the interrogatories put by the plaintiff. Under these circumstances, the judge, in our opinion, erred in excluding the evidence on the ground assumed. The object of the law in requiring that interrogatories shall be served on the adverse party, or his counsel, three days previous to their being forwarded, is to afford the latter sufficient time to examine them and make their objections or cross-interrogatories. It is clear that the defendant's

Stafford and Husband v. Dunwoodie.

counsel consented to waive this delay, when, at the request of the plaintiff's counsel, he accepted service of the interrogatories the day after he received them, and returned them to the clerk's office accompanied by minute objections, which prove, as he declared himself in court, that he had them as long as he wanted them. Had they remained two or more days in the office of the clerk, after being returned there, it would have been of no advantage to the defendant; nor has he suffered any injury from their being taken away and forwarded.

It is, therefore, ordered, that the judgment of the District Court be reversed, and the verdict set aside; and that the case be remanded for a new trial, with instructions to the judge below not to reject the testimony taken under this commission, on the ground that no legal service of the interrogatories had been made on defendant's counsel, three days before being forwarded. The costs of this appeal to be borne by the appellee.

Brent, for the appellant. On the part of the defendant, the case was submitted by *McGuire* and *Ray*.

JANNETTA STAFFORD and Husband v. JOHN DUNWOODIE.

A wife has a privilege on the moveables of her husband, for her dotal, but not for her paraphernal property. For the latter, she has only a tacit or legal mortgage, on his immoveables. C. C. 2367, 3182.

Defendant having seized under a *fi. fa.* certain moveables belonging to the husband of the plaintiff, the latter procured an injunction, pending which she obtained a judgment against her husband in a suit for separation of property, and, in virtue thereof, caused the moveable property, previously seized by defendant, to be sold, and purchased it herself, crediting the amount upon her judgment. On a motion to dissolve the injunction: *Held*, that by his seizure defendant had acquired a privilege on the moveables seized; that the rights of the wife, being merely paraphernal, gave her no privilege on the moveables; and that having, by the effect of her seizure, disabled the defendant from enforcing his privilege, she was responsible in damages for the injury he sustained from her act.

APPEAL from the District Court of Rapides, *King*, J.

SIMON, J. The plaintiff Jannetta Stafford, is appellant from a

judgment dissolving an injunction, which she had obtained, to arrest the sale of certain property belonging to her husband, which had been seized at the suit of the defendant, Dunwoodie, and condemning her to pay the sum of \$3975, being the amount of the damages sustained by the defendant from the effect of the injunction, and also \$500 as counsel fees.

The facts of the case show, that sometime in March, 1840, J. Stafford sued her husband for a separation of property; that on the second of June following, executions having been issued at the suit of Dunwoodie against her husband, were levied upon certain personal property which belonged to him; and that in August ensuing, the sheriff was enjoined, at the suit of the plaintiff, J. Stafford, from proceeding any further on the writs then in his hands. In the mean time, during the pendency of that action, she obtained judgment against her husband for a large sum of money, by virtue of which she caused all his property to be seized and sold in satisfaction thereof; and the personal property which had been previously seized on by the sheriff, was included in and was a part of the property sold to satisfy her execution. She received the proceeds of the sale, by purchasing the property herself, and crediting the amount thereof on her execution, so that when the present case was tried, the defendant had, by her act, lost the means which he previously had, of obtaining the satisfaction of his executions out of the sale of the property seized by virtue thereof.

We think the District Judge did not err. The rights which the plaintiff, J. Stafford, set up and enforced against her husband, were merely *paraphernal*, and not dotal; she had, therefore, no privilege on his personal property, but simply a tacit or legal mortgage on his immoveable estate. Civ. Code, arts. 2367 and 3182. On the other hand, the defendant, by the effect of his seizure, had acquired a privilege on the property seized, (Code of Pract., art. 722,) which he could not be deprived of by her; and if he was subsequently prevented or disabled from enforcing his privilege, it was owing to the fault or act of the plaintiff J. Stafford, under the protection of the writ of injunction issued at her request. It is clear, therefore, that the injunction was wrongfully sued out.

Dunbar v. Morris, Tutrix, and another.

The record shows that the property seized was worth the amount established by the lower court as the *quantum* of damages sustained by the defendant, and we think they were correctly and properly allowed.

With regard to the counsel fees, we are of opinion that instead of five hundred dollars, two hundred and fifty dollars only should be allowed. This appears to us to be a sufficient and reasonable compensation in this case.

It is, therefore, ordered, that the judgment of the District Court be affirmed, except so far as it allows \$500 for counsel fees, and that the same be reversed as to the said sum of \$500, instead of which, it is ordered that the defendant recover only two hundred and fifty dollars for such fees, and that the costs of this appeal be borne by the appellee Dunwoodie, those of the lower court to be paid by the appellant.

Flint, for the appellant.

Hyams, for the defendant.

WILLIAM H. DUNBAR v. SARAH MORRIS, Tutrix, and another.

An agreement, by an attorney at law, to receive payment of a judgment in any thing but the legal currency of the United States, will not be binding on the plaintiff.

APPEAL from the Court of Probates of Concordia, *Dunlap*, J.

This case was submitted, without argument, by *F. H. Farrar*, and *T. P. Farrar*, for the plaintiff, and *Stacy* and *Sparrow*, for the appellants.

MARTIN, J. The defendants, tutor and co-tutor of the heirs of Elias Bass, resist the plaintiff's claim, which is founded on a judgment obtained by the latter against the ancestor of their wards, on the allegation that an agreement was entered into by D. S. Stacy, who was employed by them to conduct the affairs of the succession, and H. B. Barbour, the plaintiff's attorney, employed to collect the amount of the judgment, whereby payment thereof was to be effected in notes of certain banks of the State of Mississippi. They allege that they had procured a sufficient amount of them

Hewitt v. Bridewell.

before the period at which the payment was to be made, and have ever since kept the said notes ready to be paid, in discharge of the judgment; that Barbour having died, the plaintiff employed Montgomery and McMillan to attend to the collection of the judgment, who recognized the agreement entered into by Barbour and Stacy, and expressed their assent thereto, promising to receive payment accordingly; that notwithstanding this, and the readiness of the defendants to effect the payment in the manner thus agreed on, a vexatious suit has been brought against them to enforce payment otherwise than in the manner above stated. There was judgment against the defendants, and they have appealed.

It does not appear to us that the court erred. It is not even alleged that any of the agents employed by the plaintiff were authorized by him to receive payment in anything else than the legal currency of the United States, nor that he had knowledge of any agreement made by any of them with the defendants in relation to the collection of his claim, much less of any assent of his thereto. The defendants, therefore, cannot avail themselves of such an agreement against him. 1 Mart. N. S. 133. 12 Mart. 688.

Judgment affirmed.

JOHN H. HEWITT v. SQUIRE O. BRIDEWELL.

One who seeks equity, must do equity.

APPEAL from the District Court of Madison, Curry, J.

GARLAND, J. The petitioner claims a tract of land of about seventy-seven acres. His title is founded on a certificate of purchase from the United States in the name of Margaret Earl, and a sale from her to him, written on the back of the certificate, which transfers all her rights, and directs that a patent be issued in his name, which sale was afterwards ratified by the vendor, or rather another sale was made to the plaintiff by an act under private signature. The right of Margaret Earl was to a *float*, under the pre-emption law of June 19, 1834. The transfer and sale to the plain-

tiff was made after her rights were established, and her title from the government vested.

The defendant also claims title by various mesne conveyances from Margaret Earl. The plaintiff prays for damages for the injury to his property and for rents and profits, and the defendant for the improvements and additional value given to the land by the labor bestowed on it, asserting a possession in good faith. The defendant also claims the title which Hewitt has obtained, saying it was procured for the benefit of Seaton, one of the warrantors, the plaintiff having represented himself to Margaret Earl as his agent. The facts are, that, in the year 1834, Seaton, being in want of a title to enable him to get possession of a lot of public land near him on the Roundaway bayou, applied to the plaintiff to procure for him a *float*, under the pre-emption law passed by Congress on the 19th of June, 1834, for which Seaton was to pay \$500 to the plaintiff, "and clear the claim or *float*, out of the Public Land Office at Monroe—two hundred dollars to said Hewitt, and one hundred dollars to pay for the location of the floating claim, to be paid at Monroe, as soon as expedient, and the other three hundred dollars to be paid on or before the 15th of January next," meaning in the year 1835. This contract was made on the 2d December, 1834, and on the next day the parties went together to the residence of Margaret Earl; who was entitled to such a claim, and which Hewitt had previously contracted to purchase. At his instance, and by an act which he signs as a witness, Margaret Earl made a sale to Seaton of the lot of land, describing it as having been made for the sum of \$100. There is no condition in this sale; but it is stated under what law she claims, and it avers that the evidence of her rights is deposited in the Land Office. Seaton took possession of the land, and sold it; and from his vendee, Foster, it has passed to the present defendant.

Why the land was not paid for at the Land Office until January, 1838, is not explained; nor does it fully appear, what occurred between the plaintiff and Seaton previous to that time. It does not appear that the latter advanced the one hundred dollars to pay for the land at the Land Office, nor that he paid any portion of the five hundred dollars he had agreed to give the plaintiff. Sea-

ton alleges that he has made payments to the plaintiff. The latter denies it, and there is no proof about it, except that during the summer or autumn of the year 1837, the plaintiff endeavored to induce Margaret Earl to make a transfer to him, on the ground that Seaton had not complied with his agreement with him, which she refused. Finally, the plaintiff, at the last mentioned date, got Margaret Earl to go with him to the Land Office at Monroe, where he paid for the land, and the receipt or certificate of purchase was issued in her name, and immediately after a transfer of it was made to him on the back of the paper. It was attested by two witnesses, who were in the Land Office, one of whom swears that Margaret Earl appeared to do it willingly, and seemed to be satisfied; but the evidence shows that the plaintiff had previously told her, that he only wished her to make the transfer to him that he might complete his contract with Seaton, and that the land was for him. This she no doubt believed, and in fact manifested considerable anxiety that Seaton should have the land. Sometime after this, it appears, that the plaintiff, Seaton, and Foster were at Monroe, when the subject was again discussed among them. Copley says that, at that time, all the parties were in his office; that Seaton and Foster knew then that the plaintiff had a transfer of the certificate, and that the former did not pretend that he had paid the sums promised by him; and Hopkins proves, that, afterwards, from conversations he had with Seaton, he was induced to believe that the money was not paid, and, further, that Foster expressed great anxiety to purchase the plaintiff's rights, and requested him to recommend certain persons to the plaintiff as being good security on the notes which he was to give him, which the witness declined to do, and the negotiation terminated.

After the interview at Monroe, which took place in March, 1838, there seems to have been a race between the plaintiff and Seaton, who should again see Margaret Earl first. The former was the victor in this contest, having, as he stated to a witness, travelled a great part of the night, and swam a considerable river to get ahead of his rival. On the 28th of March, 1838, he presented himself to Margaret Earl, with a deed written out, again conveying the land to him, but telling her at the same time that it was for Seaton, as she swears, and as one of the witnesses to the

deed also testifies. A short time after this deed was executed, Seaton reached Margaret Earl's residence, and finding that his competitor had got another deed, he persuaded her to go before the Parish Judge of Madison, before whom she made a declaration of the manner in which she had been imposed upon, and declared her intention of adhering to the sale she had made to him in 1834, which she ratified in all its parts. There was a judgment in the District Court for the defendant, and the plaintiff has appealed.

On the trial, the plaintiff took various bills of exception to the opinion of the judge refusing to admit or to exclude testimony. One was to his refusal to admit in evidence, two letters from Seaton to the plaintiff, dated in September, 1835, as irrelevant, and because one of them was in some degree mutilated. Another was to his refusal to order the defendant, or his warrantors, particularly Seaton, to produce in court a duplicate of the alleged contract between Seaton and the plaintiff, made in December, 1834. We think that the judge erred in both instances; but as the letters, and what purports to be a copy of the contract, are in the record, and the warrantor, Seaton, in his answer substantially admits it, we have considered them. Another bill of exceptions was taken to the admission of the deposition of Margaret Earl in evidence, on the ground that she was interested. We think the judge did not err. If she was bound, as the warrantor of both parties, the warrantor Seaton has released her from all liability, and it is her interest now to testify in favor of the plaintiff; but he objects, as her testimony is opposed to him.

We think there cannot be a doubt that Margaret Earl was imposed on by the plaintiff, and induced to sign the transfer on the back of the receipt or certificate from the Land Office, from the belief that it was for the benefit of Seaton, and that it was with the same belief that she signed the deed to the plaintiff on the 28th of March, 1838. He represented himself as the agent of Seaton, or at any rate as acting in such a manner as would enable him to complete the agreement entered into between all the parties. This he has not done.

We think the legal title to the land is by the transfers vested in the plaintiff; but that he obtained it by representing himself as the

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agent of Seaton, or as acting with a view to get the title to the land in order to convey it to him. By these pretences the title was procured, and Seaton has thereby acquired an equitable right to it; but he cannot compel the plaintiff to make a conveyance to him, until he shall himself comply with the obligations he has incurred. He who seeks equity, must himself practice it; and the defendant Seaton asks us, with rather a bad grace to divest the plaintiff of his title, and give effect to his equitable right, without complying with his obligation to pay the price he was to give. We are of opinion that justice requires that this case should be remanded for a new trial.

The judgment of the District Court is therefore annulled, and the case remanded for a new trial, with directions to the judge to conform to the opinions herein expressed, in relation to the admission of testimony, and in other respects to proceed according to law; the appellee paying the costs of this appeal.

Copley, for the appellant.

Stockton and Dunlap, for the defendant.

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SUCCESSION OF WILLIAM FRANTUM—JOHN M. FENNER, Administrator, Appellant.

The acknowledgment and payment by tutors, curators, and executors, of debts due from the estates administered by them, are *prima facie* evidence of their correctness. When, from the extravagance of the charges, the unnecessary character of the supplies, or from any other circumstance, bad faith or dishonesty may be presumed, courts cannot be too strict; but where there is every appearance of good faith and correct management, such fiduciaries should not be held, in the settlement of their accounts, to the strictest rules of evidence. Were they obliged to prove the signatures to every receipt, the cost of the attendance of witnesses or of their depositions, would involve the estates in heavy and unnecessary expense.

Full commissions of two and a half per cent on the productive property, may be allowed to an administrator, though the whole estate has not been fully administered by him.

APPEAL from the Court of Probates of Ouachita, *Lamy, J.*

GARLAND, J. The record shows that on the seventh of January, 1840, William Frantum died, and that shortly afterwards his widow was confirmed in the tutorship of their children, and appointed

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administratrix of the estate. Her brother, James L. Fenner, assisted her as a relative, and as an agent, in the administration, until her death, which occurred on the twenty-third of October following. Shortly after this period, James L. Fenner was appointed administrator of the estate of William Frantum deceased, and of that of Ann E. Frantum the administratrix, she having died without rendering any account of her administration. J. L. Fenner was also appointed tutor of the children, nine in number. He took them from the plantation to his own residence in the town of Monroe, where the evidence shows that he treated them with great kindness, and was educating them, and supplying all their wants, in a manner suitable to their condition in life. He also administered the estates of the deceased persons, which consisted principally of a plantation and slaves, until his death, in the month of January, 1842. In his will, he named Margaret Ann Fenner as his executrix, and she took upon herself the execution of the trust.

In March, 1842, the executrix presented an account of the administration of the estate of Frantum previous to the death of Ann E. Frantum, and as afterwards administered by James L. Fenner. She presents the whole in one account, alleging it is not in her power to separate the accounts of the two administrators, as Fenner was the agent of Ann E. Frantum, and, after her death, continued the administration as though there had been no change or new appointment. In this account, she, in the first place, states the amount of the inventory of Frantum's estate, made after the death of Ann E. Frantum, which was the largest of the two. In this inventory, there was included an amount in cash, a portion of the crop of cotton of 1839, and that of 1840, which made up the aggregate of the whole succession. The property in the inventory was returned in kind, but the cotton having been sent to market and sold, a separate account of it was stated, showing the amount at which it was appraised, and the amount of the proceeds of the sale. For the latter sum, the estate of James L. Fenner held itself responsible. These proceeds, consisting of the cash included in the inventory, with a small amount deposited in bank, and the sums collected from Nettles and Holmes, made a sum of \$13,846 93. The executrix then charges the estate with a variety of sums, paid during the administration of A. E. Frantum and

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during that of J. L. Fenner, for debts due by the succession, supplies for the plantation, and board, clothing, and necessities for the minors, as well as for their education. An attorney's fee is charged, for advice and attention to the interests of the estate, and for services in making out the accounts ; and also two and a half per cent commission on the inventory.

John M. Fenner, who succeeded James L. Fenner as administrator of the estate and as tutor of the children, was called on to show cause why the account should not be approved, and a balance of \$2962 81, which appeared to be due to the estate of James L. Fenner, ordered to be paid by him. He appeared, and filed an opposition, objecting to about fifty items out of an account composed of nearly one hundred. A number of these items were objected to, simply on the ground that they were paid by A. E. Frantum during her administration, but their validity is not put at issue. Another objection comprised items, for which there were no vouchers. A third class of items were objected to because the bills were made out in the name of J. L. Fenner, or of a steamboat captain, without denying that the articles mentioned in them were used on the plantation, or by the children. Fees paid to different lawyers, employed during the lifetime of Frantum, and since his death, are the subject of the fourth objection. The expense for the board, education, and clothing of the nine minor children, from the death of their mother to the time of the appointment of the opponent as their tutor, and articles purchased for them, form the fifth class of items objected to. Finally, the charge of two and a half per cent for commissions as administrator, is objected to, as being illegal.

On the trial, it appeared that, from the time of the death of Ann E. Frantum, to that of the appointment of the opponent, James L. Fenner had the children at his house, that he provided for them all the necessities of life, and such other things as were proper. He was proceeding to give them such an education, as the facilities offered by his near residence to respectable schools afforded, and was disposed to enable them to acquire such accomplishments as the ample fortune left by their parents entitled them to expect. In short, to use the language of a witness, "the children were well treated, as much so, as if they were Fenner's own." It appears

also, that James L. Fenner was in the habit, during the time that the children were with him, of getting such supplies of provisions from the plantation belonging to the minors, as it afforded. It was also shown, that a number of the articles mentioned in the different bills from New Orleans and elsewhere, were used on the plantation or in the family. Except in a few cases, there has been no evidence offered of the signatures to the different accounts and receipts, but we see no articles mentioned in those objected to, but such as might very reasonably be wanted on a plantation, or for the use of a family of children. The charges are for pork, flour, sugar, coffee, cotton-bagging, rope, plantation utensils, &c.; for coats, hats, shoes, articles of female apparel, the freight bills of steamboats, and the like. There is nothing in the accounts to excite a suspicion of unfairness, and the opponent has raised none by any evidence which he has offered.

The Probate Judge seems to have scrutinized the account rendered by M. A. Fenner, with great care, and reduced the balance claimed to \$2102 67, reserving to her the right of showing, at a future time, her right to two items of \$100 each, but rejecting them in this proceeding, as well as every item not sustained by a voucher or other evidence. From the judgment decreeing the payment of the balance of \$2102 67, with interest of five per cent per annum, the opponent has appealed; and in this court the appellee has prayed for an amendment of the judgment, by allowing \$100 more paid to Isaac Thomas, as a fee in the suit of *Brown v. Frantum*.

In 2 Mart. N. S. 298, the account of an executor, accompanied by the vouchers in support of it, was held to be *prima facie* evidence of its correctness. In 6 Mart. N. S. 335, it was said that, "the acknowledgment and payment of debts by tutors and curators, which they know to be owing by the estate which they administer, may be considered as *prima facie* evidence of their correctness." We think these principles are reasonable and just; and, if no presumptions of bad faith or dishonesty are raised, they should have their proper effect. When any thing of that kind is presented to rebut the *prima facie* evidence, such as extravagant charges, the purchase of articles or supplies not probably needed, or concealment of the funds, or any thing of the kind, courts can-

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not be too vigilant and strict in their investigations and judgments ; but where there is every appearance of good faith and correct management, executors, administrators, tutors, and other fiduciaries, ought not, in the settlement of their accounts, to be held to the strictest rules of evidence. It cannot be expected that they can always have witnesses to their various transactions, and were they obliged to prove the signature to every receipt for debts paid, supplies purchased, or other matters, the expense of summoning witnesses and of their attendance, the taking of depositions and procuring testimony generally, would involve successions and the property of minors, in heavy, and oftentimes unnecessary expenses.

As to the class of credits which appear to have been paid by Ann E. Frantum during her administration, we think that the judge did not err in retaining them in the account. No objection is made to their correctness, but it is contended that as she paid them, J. L. Fenner should not have a credit for them in this account. This would be true, if Fenner's executrix did not also offer to account and actually account for what A. E. Frantum received during her administration. The opponent, therefore, has no right to reject the sums paid by A. E. Frantum, unless he is willing to strike out the sums she has collected, which the executrix assumes and renders an account of.

The items in the account which were unsupported by vouchers, were disallowed by the Probate Judge, except those for the board, education, and necessary attention to the minors, and the commissions. These were proved by parol evidence, which disposes of the second objection.

The objection to the third class of items, was, that the bills were not made out in the name of Frantum's estate, nor the words administrator or tutor affixed to the name of Fenner, either in them or in the receipts, and that, in two or three instances, bills were offered as vouchers, which were for the purchase of articles in New Orleans, and made out in the name of steamboat captains, trading on the Ouachita river. Some of the articles in the latter class of accounts, are flour, molasses, boys' clothing, and household furniture ; and in the former are charges for a horse which is shown to be on the plantation, for work on the gin and other buildings, and for such articles as would, probably, be necessary

on a plantation, or in a family. It is not denied that the articles were necessary, nor that they were used. If the opponent was of opinion that any thing incorrect was intended, or that the articles were not received and used, it would have been easy for him to say so, and have given the executrix notice of what she was required to prove. We do not think that the judge erred, in admitting as many of this description of vouchers, as he did.

The fourth objection is to allowing fees to different lawyers, for services rendered to Frantum previous to his death, and to his succession since that time. The fee to J. K. Elgee was allowed on proof of the admission of A. E. Frantum, that he had been employed; but that paid to Thomas was rejected, as the opponent alleged that it was prescribed. The fee claimed by him, is for services rendered in the case of *Brown v. Frantum*, and it was paid in, or subsequent to the month of October, 1840, and that suit was not finally decided until the October term of this court in that year. 16 La. 414. 6 Ib. 39. The opponent has not shown that the services of Thomas ceased previous to the termination of the case, and that being so, there is no prescription. The judge, therefore, erred, in not allowing a credit for the amount paid to him. As to the fee allowed to the attorney of the late representatives of the estate, it does not appear to us extravagant, if tested by the decision of this court recently made in the case of *Copley v. Harrison and Wife*, ante, p. 83.

The fifth objection is to a variety of items for the board, education, clothing, and attention to the minors, and for clothes for the slaves on the plantation, from October, 1840, to January, 1842. There were nine minors at Fenner's, and upwards of fifty slaves on the plantation making large crops of cotton. The price charged for articles the most necessary, such as shoes, coats, blankets, &c., are objected to, because it is not shown, to adopt the language of the opposition, where the articles *went to*, which we suppose means, that it was not proved what particular dress or pair of slippers was worn by one of the young ladies, what pairs of shoes were worn by the boys, or which slave had a blanket or a pair of brogans. A piano purchased for the use of a daughter of the deceased, is most strongly objected to. The judge reduced the claim for boarding the children about one-third, and rejected or reduced other

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charges. We think, considering the circumstances of the minors, that the claims under this head are not extravagant, and that the judge was right in not reducing them lower than he did. Civ. Code, art. 343.

The question of commissions on the whole productive property, as shown by the inventory and evidence, is especially contested. It will be remembered that James L. Fenner acted in the double capacity of administrator and tutor; in the former, he was entitled to some commissions, and in the latter, the Code, article 342, fixes his commissions at ten per cent on the revenue, which is not claimed in this instance. We have before stated, that the account is rendered as if J. L. Fenner had administered the succession from the time of Frantum's death; and no commission had ever been charged by any one previously. All the mortuary proceedings had taken place; the property had been placed in such a situation as to secure it to the heirs; the plantation had been kept up and superintended; the debts due by the estate had been paid, and those owing to it in a great measure collected, so as to leave but little more to his successor than the care of the children and the necessary attention to the plantation. In the case of *Smith, Administrator, v. Cheney, Administratrix* (1 Robinson, 98), we allowed the first administrator a full commission, although it appeared that he had not fully administered the estate, but that he had administered much the greater part of it. If we were to give the commissions allowed by the article 342 of the Code to the tutor, it would not differ very widely from the sum claimed. We think, under the peculiar circumstances of this case, that the judge did not err in allowing that item of the account.

As to the claim for \$1100, which it is stated that J. L. Fenner had borrowed of Ann E. Frantum, it is shown that the amount was taken out of the cash on hand at the time of Frantum's death, or out of the proceeds of the crop, the whole amount of which is accounted for in the account filed. We do not see the slightest ground for the claim of \$4000 set up by the opponent. There was on hand, at Frantum's death, an amount exceeding \$3000; but it is placed on the inventory, and an account thereof rendered.

Bookout v. Anderson and others.

The objections taken in the bill of exceptions, have been answered in the opinion expressed on the various points.

The judgment of the Probate Court is hereby amended, by adding to it the sum of \$100, the amount of Thomas' claim, which will make it \$2202 57, with legal interest from the 27th July, 1842, until paid; and the said judgment is in all other respects affirmed, with costs.

Copley, for the appellant.

McGuire, contra.

BENJAMIN R. BOOKOUT v. SAMUEL ANDERSON and others.

APPEAL from the District Court of Madison, *Tenney*, J.

GARLAND, J. This suit is instituted to recover a number of slaves, which the plaintiff alleges that the defendant Anderson, has illegally taken into possession, and fraudulently removed from the State of Mississippi. The plaintiff avers that the equitable title to the slaves is in him, but that the legal title is vested in Messrs. A. M. & W. H. Paxton, and G. B. Tate, to whom the slaves had been conveyed as trustees, to secure certain debts due to Tiernan, Cuddy & Co. These trustees also come in with a petition of intervention and claim the property, alleging that the deed to them is in due form, and was legally executed and recorded in Washington county, Mississippi, previous to the removal of the slaves from that county, or to their becoming the subject of a contract between the plaintiff and Anderson. Both the plaintiff and intervenors allege that Anderson had mortgaged the slaves to Shelton and Perry, with the fraudulent purpose of defeating this action and their rights. These persons are non-residents, and are made parties to the suit. No curator, *ad hoc*, nor any other representative seems to have been appointed to either of them, and they were only notified by having a citation posted on the court house door. Perry never appeared, nor was any further step taken against him. Anderson and Shelton answered; the former alleging a title to the slaves, as having been purchased of the plaintiff, and the latter asserting the validity of his mortgage, which

he avers was executed to secure a *bona fide* debt, and in ignorance of any claims on the part of the plaintiff or intervenors. The plaintiff and the intervenors pray for damages for the hire of the negroes, and the value of those that shall not be produced. The defendant Anderson, also asks for damages.

It is admitted on all sides, that the slaves were at one time the property of the plaintiff, and the question is, how has he become divested of it. The intervenors show two deeds of trust, which the plaintiff admits, whereby the slaves, and other property, were conveyed to them as trustees, to secure the payment of several drafts, for a large amount, drawn on and accepted by Tiernan, Cuddy & Co. These deeds were duly recorded in the county in Mississippi, where the slaves were, a long time before Anderson got possession of them. The deeds are in the usual form of deeds of that kind, and it is not shown that the debt to Tiernan, Cuddy & Co. has been paid. The drafts on that house were drawn by the plaintiff, to the order of and endorsed by Harvey Houghton, who was, at the time of the execution of the deeds, a part owner of the property, and joined in the execution of them, but afterwards transferred all his interest to the plaintiff. It is shown that the plaintiff was the owner of a body of lands on Cold Lake, where he had a plantation, on which these slaves were. He made a verbal agreement to sell to Anderson the lands and slaves for about \$65,000, of which a considerable sum was to be promptly paid, and the balance secured by some Bank in Mississippi; but no title was to be made, until the property was paid for, or secured by the Bank. The land and slaves were taken into possession by the defendant, Anderson, and kept for some time, when two deeds of sale were, at different periods, made to him for the land, but nothing was said in either of them about the slaves. The consideration of these deeds is stated to be, \$25,000 for one part of the land, and \$15,000 for the other, paid in cash. Anderson produced several receipts for various sums, signed by the plaintiff, and stating that they were paid on account of the land and slaves on Cold Lake. All these receipts bear date a considerable time previous to the execution of the deeds; the name of no slave is stated in them, and they go far to sustain the impression, that a complete title was not to be made to the slaves, until the price was paid or secured. Ander-

son alleges, that he has given his notes to the plaintiff for the whole price agreed on ; but this is not proved, nor did he call on the plaintiff to produce the notes, or to account for them. He insists on the delivery of the slaves to him in Mississippi, and avers that the title is complete by the laws of that State, which do not require the title to slaves to be in writing.

There is a mass of testimony in the record, as to the different negotiations and arrangements between the parties and with others, but its tendency, on both sides, is to the establishment of the points already mentioned. There is no evidence that the debt to Tiernan, Cuddy & Co. has been paid ; nor is there any conveyance of the slaves, other than the expression in the receipts of the payments having been made on account of the lands and slaves. Anderson does not show that he has secured the price of the slaves in any manner, but relies solely upon the delivery of them. The judgment rejected the plaintiff's demand, and ordered Anderson to be quieted in his title to the slaves, with the exception of two, and as to them a nonsuit was entered ; and Anderson was ordered, as appears by the record, to pay the costs. The plaintiff has appealed.

There is a bill of exceptions in the record, taken by the plaintiff, to the rejection of the deposition of Harvey Houghton, as evidence. It involves no new principle, and it is sufficient to say that we do not think the judge erred. The witness, it is clear, has not been legally discharged by all the partners in the house of Tiernan, Cuddy & Co., from his responsibility on the drafts accepted by them, and is therefore interested.

In the court below, the rights and interests of the most important parties to the suit, seem to have been entirely overlooked, that is of the trustees under the deed of trust to secure the debt to Tiernan, Cuddy & Co., and of Shelton and Perry the alleged mortgage creditors of Anderson. Perry has been entirely unnoticed since the citation for him was posted on the court house door, and not a word is said in the judgment about the rights of the intervenors. They are yet in the District Court, without any decision on their claims, and are not parties to this appeal. We are not satisfied with the judgment in the case as between the parties before us, and think it should be remanded, that those who are

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as much, or more interested than the plaintiff and defendant Anderson, may be heard; and that as between the latter it may be reconsidered.

It is, therefore ordered, that the judgment of the District Court be avoided, and that the case be remanded for a new trial; the appellee paying the costs of the appeal.

T. N. Pierce and Stacy, for the appellant.

Bemiss, contra.

ROBERT B. LOTT and others v. LESTAN PRUDHOMME and another.

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A receipt of the Receiver of Public Moneys, for the price of government lands, is sufficient evidence of title from the United States, to form the basis of a petitory action—not that it is of equal dignity with a patent, but evidence of an equitable title on which the owner may recover.

Where the boundaries of a confirmed claim are vague and uncertain, and are to be fixed by the operations of the surveying department, or the confirmation is only the recognition of a pre-existing right, and before such survey and location the government sells a part of the land, not necessarily embraced within the tract confirmed, the title of the purchaser under such sale will prevail.

The Commissioner of the General Land Office has no authority to vacate a patent already issued; but he may declare a *certificate of purchase* of lands, which the law has forbidden to be sold or disposed of, to be void.

Whenever the question arises, whether the title to property, which belonged to the United States, has passed, it must be resolved by the laws of the United States. But where it has once passed, it becomes, like all other property in the State, subject to State legislation, so far as such legislation is consistent with the admission that the title has so passed.

A patent from the United States, for a portion of the public lands, is conclusive, unless attacked on the ground of error or fraud; and the question of error or fraud, so far as it concerns a citizen of this State, must be determined by our laws.

The moment a patent for public lands has passed the great seal, it is beyond the power of the officers of the United States.

AUGUSTE METOYER, who had been cited in warranty to defend this suit, is appellant from a judgment rendered in favor of the plaintiffs, by the District Court of Natchitoches, *Campbell, J.*

Dunbar, for the plaintiffs.

Morse and Roysdon, for the appellant.

Lott and others v. Prudhomme and another.

BULLARD, J. The plaintiffs assert title to a tract of land described as composed of Nos. 1, 2, 3, 4, 5, and 7, of section No. 18, in township No. 8, of range No. 5 west, containing $476\frac{44}{100}$ acres, which they allege was purchased of the United States by Lott and Jones, and a part sold by them to their co-plaintiffs in this case. The plaintiffs gave in evidence, as proof of their title, a certificate of purchase, or receipt for the price of the lots mentioned, signed by Eastin, Receiver, dated at the Land Office, Ouachita, Louisiana, April 9, 1836.

Metoyer, who came in to defend the action, on the call of José Maria, his tenant,* sets up title under a confirmation by the Land Commissioners of the inchoate title of Verges, which appears to have been located so as to cover in fact the lots purchased by the plaintiffs. That location was not made until the 11th of November, 1836, after the plaintiffs had purchased, and was approved by the Surveyor General on the 1st of December of the same year. At the time of the plaintiffs' purchase, the lots were represented, on an approved township plat, as public lands.

The Commissioners' certificate, confirming the claim of Langloise, under the title of Verges, described the land as bounded below by Pierre Derbaune, and situated on the river Bruslé, having a front of ten *arpens*, by a depth of forty.

We have more than once ruled, that the receipt of the Receiver of Public Moneys for government lands, is sufficient evidence of title out of the government, to form the basis of a petitory action. 10 La. 159. 11 Ib. 321. 19 Ib. 336. We do not mean that such receipt is of equal dignity with a patent, but that it is evidence of an equitable title, upon which the owner may recover in a petitory action.

The certificate of the Commissioners gives us a very vague description of the land confirmed. Its calls are uncertain, and necessarily depend upon the operations of a surveyor, and upon evidence of Derbaune's upper boundary, of which we have no information.

* Prudhomme disclaimed title, and alleged that he was not in possession of any part of the land.

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The case of *Lefebvre v. Comeau et al.* and that of *Slack v. Oril-lion*, both reported in 11 La. (pp. 321, 587) cannot easily be distinguished from this. We then held, that when the boundaries of a confirmed claim are vague and uncertain, and are to be fixed by the operations of the surveying department, or such confirmation is only the recognition of a pre-existing right or claim, and, before the survey and location, the government sells a part of the land not necessarily embraced within the tract confirmed, the title of the purchaser will prevail.

The location of the title of Verges was not only *ex parte*, but was made after the plaintiffs had purchased, and there is nothing on the face of it to show that it embraced the lots in question. On the contrary, it is left doubtful, even now, whether the land as surveyed, in fact adjoined Derbaune, as called for in the certificate. But the evidence upon which the surveyor concluded that the land as surveyed was included in the confirmation was *ex parte*, and, as to the plaintiffs, *res inter alios acta*.

But it is shown that the Commissioner of the General Land Office instructed the Register of the Land Office to return the patents which had issued, if they had not been delivered to the patentees, and if they had been, to advise them immediately of the illegality of their entries, and to request them to return the patents in order that the purchase money might be refunded. This order bears date July 13, 1841, more than four years after this action was instituted. It thus appears that the plaintiffs' patents were actually issued and transmitted to the Register of the Land Office, but were withheld by order of the Commissioner of the General Land Office. It does not appear that these patents have ever been vacated or annulled, nor are we acquainted with any law which authorizes the Commissioner to vacate a patent already issued. We repeat, however, what was said in the case of *Guidry v. Woods*, 19 La. 334, that we do not doubt the authority of the Commissioner of the General Land Office to declare void a *certificate of purchase of lands, which the law forbids to be sold or disposed of*.

We do not question the doctrine sanctioned by the Supreme Court of the United States, in the case of *Wilcox v. Jackson*, that whenever the question arises, whether the title to property which

had belonged to the United States, has passed, that question must be resolved by the laws of the United States. But when the property has passed according to those laws, that then the property, like all other in the State, is subject to State legislation, so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States. And further, that in an action at law, the patent from the United States, for a part of the public lands, is conclusive, unless attacked for error or fraud. 13 Peters, 498.

It is true such patent may be avoided and annulled for mistake or fraud, but that question, so far as it concerns a citizen of the State, must be solved by our own laws.

According to these principles, even admitting the right of the Commissioner of the General Land Office to cancel an entry and sale of public lands before the issuing of a patent, yet the moment a patent has passed the great seal, it is beyond the power of the officers of the general government. It is true the instrument in this case has been withheld, but we conceive that the mere possession of the parchment does not affect the right of the patentee.

The certificate under which Metoyer claims is vague as to the description of the land; and it cannot be said that the particular land on which it was located, for the first time, since the inception of this suit, upon very slight evidence of its identity with the tract originally granted to Verges, had been reserved from sale previously to 1836, when it figured on the township plat as subject to private entry. The defendant Maria, and those under whom he claims, may blame themselves, if, in consequence of their own *laches*, the plaintiffs have acquired a patent for the land upon which they might have located their certificate.

There is not sufficient evidence to make out title by prescription.

Judgment affirmed.

Mulhollan, Executor, v. Henderson and others.

CHARLES MULHOLLAN, Executor, v. FRANCIS HENDERSON and others.

A prayer for a trial by jury, by one of two or more debtors bound *in solido*, will not enure to the benefit of those who have not joined therein.

Under the act of 28th February, 1837, actions against the sureties of a sheriff on his official bond, are prescribed by the lapse of two years.

APPEAL from the District Court of Rapides, King, J.

SIMON, J. Two of the defendants, Henderson and Texada, are appellants from a judgment condemning them to pay, *in solido*, the sum of five hundred and sixty-seven dollars and fifty cents, as two of the securities on the bond of a former sheriff of the parish of Rapides.

It appears that, in the months of July and November, 1835, William J. Calvit, sheriff of that parish, sold, by virtue of two executions issued at the suit of judgment creditors of one Alfred J. Hall, two slaves. The slaves were sold and adjudicated separately, but the prices of the two amounted together, to the sum of \$1930, payable in cash. Sometime before the executions were issued, (in November, 1834,) the two slaves had been attached at the suit of the plaintiff Mulhollan, who obtained judgment against Hall in May, 1837. The amount of the sales being more than sufficient to satisfy the two executions by virtue of which the slaves had been sold, the balance remained in the hands of the sheriff, subject to the satisfaction *pro tanto* of the claim set up by Mulhollan, and standing in lieu of the property attached, to abide the judgment of the court to be subsequently rendered. The plaintiff complains that the sheriff has failed to pay him the whole of the balance remaining in his hands; and this suit is an attempt to make the sheriff's securities liable, *in solido*, for the payment of the balance.

The defendants answered separately, pleaded the general issue, and relied mainly on the prescriptions of one and two years. One of them, Robert A. Crain, prayed for a trial by jury; and the case having been called for trial, after the jury had been discharged, was continued with regard to the defendant Crain, and

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tried as to the others. Judgment was rendered against two of the defendants.

The record contains a bill of exceptions taken to the opinion of the inferior judge overruling the objection made by the appellants to going to trial, on the grounds that the jury had been discharged for the term ; that the defendant, R. A. Crain, having prayed for a jury, the said prayer enured to their benefit ; and that the case could not be tried as to a part of the defendants, and continued as to the rest.

The defendants are clearly bound, *in solido*, by the very terms of their obligation, and could have been sued separately for the whole amount claimed. This is exactly the question which arose in the case of *Smith v. Scott and another*, just decided, *ante*, p. 258, in which we held that a prayer for a trial by jury, made by one of two or more co-debtors *in solido*, could not enure to the benefit of those who had not joined in the prayer. The District Judge did not err in overruling the defendants' objection.

On the merits, we think that the defendants' plea of prescription must prevail. The right of the plaintiff to call upon the sheriff for the sum then in his hands, in order to apply it *pro tanto* to the satisfaction of his judgment, accrued in May, 1837. It was then that the sheriff was to be put *in mora* ; and the present suit was instituted in March, 1841, nearly four years after the right had accrued. Before the enactment of the law of the 28th of February, 1837, it had been held by this court that actions against sheriffs, personally, for damages, and not actions on their official bonds alleging breaches thereof, were prescribed by one year, the latter arising *ex contractu* and not *ex delicto*. 6 Mart. N. S. 665, 691. This is the extent of the decision of this court in the case of *Brown v. Gunning's Curatrix et al.*, 19 La. 470. But the statute above quoted, has provided, "that no sheriff or his security, or securities, shall be able to prescribe against his acts of misfeasance, *non feasance*, torts, offences and quasi offences, but after the lapse of two years from the day of the commission of the acts complained of," &c. This provision is clearly applicable to the present case, as the words *security or securities* used in the law, were undoubtedly intended

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in reference to the actions which may be brought on sheriffs' official bonds, for breaches thereof; particularly as this is the only way in which such securities can be made legally responsible for the acts of their principals. The law of 1837 seems to cover all the cases in which sheriffs' securities can be made liable, and, such as it is, its provisions must have their effect. We are of opinion that the plaintiff's action was prescribed by the lapse of two years, since his right accrued.

It is, therefore, ordered that the judgment of the District Court be annulled, and that ours be in favor of the defendants and appellants, with costs in both courts.

Brewer, for the plaintiff.

Flint, for the appellants.

DAVID M. CALLIHAM v. ROBERT L. TANNER, Administrator.

Discharging, or giving time to any of the parties to a note or bill, is a discharge of every other party who, upon paying it, would be entitled to sue the party to whom such discharge or indulgence has been granted.

A prolongation of the term granted to the principal debtor, without the consent of the surety, will release the latter. C. C. 3032.

The holder of a protested note, having presented it for payment to the administrator of the succession of the payee and first endorser, it was allowed by the latter, and placed on the tableau of distribution filed by him. Subsequently to the homologation of the tableau, the holder obtained a judgment, by confession, against the second endorser, and, in consideration of a higher rate of interest, granted him time at the expiration of which the latter paid the amount due on the note. In an action by the second endorser against the administrator of the first, to recover the amount thus paid: *Held*, that the first endorser, who would have been entitled, on payment of the note to the holder, to require its delivery, that he might exercise his rights against the maker, was discharged by the indulgence; and that the insolvency of the maker, at the time of the indulgence, cannot affect the question of his discharge.

A surety, who pays the debt of his principal, is entitled to all the rights of the creditor against the latter; for, however desperate his situation may be at any particular time, it may improve, and offer him ultimately complete indemnity.

APPEAL from the Court of Probates of Rapides, *Waters*, J.

MORPHY, J. This suit is brought to recover, from the estate of Wm. B. Pearce, a balance of \$1288, due on two notes, one for

\$7000, and the other for \$8100, drawn by Josiah S. Stafford, to the order of and endorsed by Wm. B. Pearce, by David M. Calliham, the plaintiff, and by Leonidas A. Robert. The notes were originally held by one John Dunwoodie, who, after they had been protested for non-payment, presented them to the defendant as administrator of the estate of Pearce. They were allowed as a just claim against the deceased, and placed on a tableau of distribution filed by the administrator, which was homologated on the 2d of May, 1838. Suits were brought by Dunwoodie in the District Court against Stafford, the maker of the note, and against Calliham and Robert, the other two endorsers, and on the 23d of May, 1838, the defendants confessed judgment for the amount claimed, with interest at ten per cent per annum from the 3d of February, 1838, upon Dunwoodie's allowing them a stay of execution until the 1st of March, 1839, with the understanding, that if one-third of the judgment, interest and costs, were punctually paid on that day, the defendant should be entitled to a further stay of execution on the remainder until the 1st of March, 1840; and that if, on that day, one-half of the remainder of the judgment were punctually paid by the defendants, they should be allowed another stay of execution on the remainder, until the 1st of March, 1841, &c. An execution, which issued upon one of the judgments for a balance due, was levied upon property of the plaintiff, for which he gave his twelve months' bond, with James D. Spurlock as his security. At the maturity of this bond the plaintiff paid its amount, which, with the interest calculated at ten per cent up to the time of payment, makes the sum of \$1288, which he now claims of the estate of Wm. B. Pearce, the first endorser, as having been subrogated to all the rights of Dunwoodie for the amount thus paid. Under these facts, the judge of the court below rendered a judgment in favor of the estate of Pearce, from which the plaintiff has appealed.

Flint, for the appellant. By the acknowledgment of the debt by the administrator of Pearce's succession, and the homologation of the tableau filed by him in the Court of Probates, there was an absolute judgment against the succession, for the amount due on the notes on which Pearce was endorser. The indulgence was subsequent to this judgment. In *Pole v. Ford*, 2 Chitty's Reports,

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125, cited in 3 Kent's Comm. 111, it was decided, that "indulgence to the acceptor, after judgment against the drawer, will not discharge the latter."

Hyams, contra. The surety is discharged by a prolongation of the term of payment, granted to the principal without his consent, where the indulgence is for a valid consideration, and precludes the creditor from enforcing his claim against the principal for the time. C. C. art. 3032. Bailey on Bills, 223. 3 Kent's Comm. 111. Chitty on Bills, 8th ed., 441, and notes. Ib. 446, 447. 3 Mart. N. S. 598. 7 Ib. 13. 4 La. 295. 11 Ib. 107. 16 Ib. 218. 19 La. 211. 6 Peters, 250. The case of *Pole v. Ford*, cited from 3 Kent's Comm., by the counsel for the appellant, was probably one in which the indulgence was not founded on a valid consideration. Here, there was a good consideration for the extension of the term, and the contract was binding.

MORPHY, J. The principle has long since been settled, that the discharging or giving time to any of the parties to a note or bill, is a discharge of every other party who, upon paying the same, would be entitled to sue the party to whom such discharge or time has been given. In the present case it is clear that, had the administrator of Pearce's estate paid to Dunwoodie the amount of the note endorsed by the deceased, the latter could only have subrogated him to such rights as he had against Stafford, the maker of the note, under his contract with him and the other endorsers. For the prolongation of time thus granted to the maker, Dunwoodie had received a valid consideration, to wit, interest at ten per cent per annum, instead of five per cent, which the debt originally bore. From the moment that he became bound by this agreement, and was precluded from collecting his whole debt from Stafford in due course of law, he lost all claim against Pearce. No person claiming under Dunwoodie can have greater rights than he had. The rule is, that the surety is discharged by a prolongation of time granted to the principal debtor, without the consent of the surety. Civ. Code. art. 3032. 3 Mart. N. S. 598. 16 La. 218. 19 La. 211. 6 Peters, 250. Bailey on Bills, see note (a), p. 358.

It is urged that the distinction between principal and surety, or maker and endorser, ceased after the judgment against the surety

resulting from the decree of homologation rendered on the 2d of May, 1838; that the endorser became a co-debtor absolutely bound, whose obligation could be discharged only in some one of the ways laid down in article 2126 of the Civil Code. Had the endorser, in a case like the present, suffered judgment to be rendered against him, without urging in his defence this indulgence to the maker, he would probably be concluded, and could not set it up when called upon to satisfy the judgment; but, in the instance before us, the indulgence was granted to the maker after the judgment had been obtained against the endorser. The latter could not be placed by his creditor *in duriori casu*, without his consent. On paying the judgment, he had the right of requiring from Dunwoodie the note on which it had been rendered, in order to exercise his rights against the maker. Although by a judgment a surety becomes absolutely bound for the debt of his principal, the creditor can do no act by which the rights or recourse of the surety against the debtor may be destroyed or impaired; if he does, he releases the surety in the same manner as if no judgment had been obtained. As to the insolvency of the maker, Stafford, which is relied on to show that the estate of Pearce was not injured by the indulgence granted to him, admitting it to have existed at the time of the agreement entered into between him, Dunwoodie, and the other endorsers, it cannot affect the question before us; the surety who pays the debt of his principal, is entitled to all the rights of the creditor against the latter, however desperate his situation may appear at any particular time, for it may improve, and offer ultimately a complete indemnity.

Judgment affirmed.

Succession of Richard Winn—Richardson and Husband, Appellants.

SUCCESSION OF RICHARD WINN—EMMA M. RICHARDSON and Husband, Appellants.

The relations of a minor, who, under arts. 290, 292 of the Civil Code, are bound to cause a tutor to be appointed to them, are authorized, and, perhaps, bound to oppose an appointment when illegally made.

The appointment of a tutor by a Court of Probates, can be set aside only by appeal, or by an action of nullity. Its legality cannot be inquired into collaterally.

Where a mother, who had been confirmed as the natural tutrix of her minor children, marries a second husband domiciliated in a different parish, though without having convened a family meeting to determine whether she shall be continued as tutrix, both herself and the minors will acquire immediately, by the very fact of the marriage, a domicile in the parish of the second husband. C. C. 48

In all cases concerning minors, the judge referred to is the judge of the parish within whose jurisdiction the minors reside, if residents of the State. Act 18 March, 1809, sec. 8.

The appointment of a tutor or curator to a minor, belongs to the Probate Judge of the domicile or usual place of residence of the father or mother of such minor, if either be alive. C. P. 944.

APPEAL from the Court of Probates of Rapides, *Waters, J.*

SIMON, J. This case is before us on an opposition by the widow of Richard Winn, deceased, now the wife of J. N. T. Richardson, and by her husband, to the appointment of the appellee, as tutor of the minor children of the deceased.

The facts of the case are these: Richard Winn, the father of the minors, died in the parish of Rapides, in October, 1840, leaving three minor children, the issue of his marriage with the opponent. The deceased left a large estate in the parish of Rapides, where his succession was opened. His widow was confirmed as natural tutrix in January, 1841, and on the 15th of the same month, an under-tutor was appointed by the Judge of Probates of the parish of Rapides. In March following, the opponent, E. M. Winn, went to the State of Tennessee to pass the summer, and for the avowed or alleged purpose of educating her children. Whilst there, she contracted a second marriage with James N. T. Richardson, a resident of the parish of Carroll in this State. This marriage took place on the 10th of August, 1841, without her having provoked a family meeting to retain the natural tutorship. In the following autumn, Richardson and his wife returned to

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Louisiana, to their domicil in the parish of Carroll; and in November, 1841, a family meeting was held in that parish, and an undertutor having been appointed, Emma M. Richardson was, pursuant to the recommendation of the family meeting, appointed tutrix, and her husband co-tutor to R. Winn's minor children. Letters of tutorship were issued to them on the 19th of November, 1841.

On the 29th of the same month, the appellee made an application to the Court of Probates of the parish of Rapides, founded on the fact of the second marriage of R. Winn's widow, by which she was, *ipso facto*, deprived of the natural tutorship of her children, praying that the tutorship might be conferred upon him, as the grandfather of the minors. An opposition was made to this appointment by the appellants on various grounds, after the trial of which such proceedings were had as to submit the application to two successive family meetings, who finally recommended that the grandfather should be appointed tutor to the minors; whereupon a judgment was rendered by the Probate Judge of the parish of Rapides, homologating the proceedings, and appointing W. H. Overton tutor of the minors. From this judgment the opponents have appealed.

Dunbar, for the appellants. The decision of the Probate Court of Carroll, can only be reversed by appeal or action of nullity. The parish of Carroll became the domicil of the tutrix and minors. Civ. Code, arts. 48, 268, 289. Code Pract. arts. 944, 950. B. & C's Dig. p. 580, sec. 8. 14 La. 478. The mother did not lose the tutorship, by her temporary absence from the State. 4 Mart. 715.

O. N. Ogden, contra. By omitting to convoke a family meeting, previous to her marriage, to decide whether she should continue to be the tutrix, the tutorship of the mother was, *ipso facto*, forfeited. Civ. Code, art. 272. The tutorship devolved upon the grandfather, by operation of law. Civ. Code, art. 281. 6 Mart. N. S. 455. 10 La. 541. The Probate Court of Carroll was without jurisdiction. The whole estate of the minors is in the parish of Rapides, where their father lived and died, and where their mother resided till her marriage. The Probate Court of Carroll had, clearly, no jurisdiction before this marriage. The marriage of the tutrix, contracted without the convocation of a family meet-

ing, could not divest the jurisdiction of the Probate Court of Rapides.

SIMON, J. Among the various grounds upon which the opposition of the appellants is founded, there is one to which our attention has been particularly called, and which, in our opinion, ought to prevail. It is the objection made to the proceedings had before the Court of Probates of the parish of Rapides, on the ground that the court was without jurisdiction, and could not legally appoint a tutor to minors, whose domicil, it is contended, is in the parish of Carroll. The conclusion we have come to on this point, will therefore preclude the necessity of our inquiring now into the various legal points arising from the pleadings and evidence, and which have been ably and strenuously argued and relied on by the counsel on both sides.

It is meet for us, however, to say, that, in considering the question of jurisdiction, on which this case, as it stands, is to be decided, we have abstained from examining into the validity and legality of the proceedings had in the parish of Carroll; and that we have given effect to the opposition made by the appellants, not because it was shown to us that they had been duly appointed tutrix and co-tutor, but for the reason that, under our laws, (Civ. Code, arts. 290, 292,) it is made the duty of the minors' relations to apply to the judge, to cause a tutor to be appointed to the minors who are unprovided with one. We think that such relations are also authorized, and perhaps even bound by law to oppose the appointment of such tutor, if illegally made. The appointment of the opponents by the judge of the parish of Carroll, is a judgment unappealed from, and against which no action of nullity appears to have been brought. As such, it must stand and have its effect, until reversed by an appeal, or annulled and set aside by an action of nullity; and it being our opinion that we cannot inquire into it collaterally in this suit, we have thought proper to leave the questions arising therefrom, entirely open, for future adjustment, in case the same should ever be brought before us in a legal way.

By the 48th article of the Civil Code, it is enacted that a married woman has no other domicil than that of her husband; and that the domicil of minors is that of their father, mother, or tutor;

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therefore, when the opponent, the widow of R. Winn, deceased, became the wife of Richardson, she acquired immediately, by the fact of the marriage, the domicile of her second husband, which was in the parish of Carroll; and her minor children, whose domicile is that of their mother, acquired also their domicile in the same parish. The fact which, perhaps, deprived her of the natural tutorship, had the immediate effect of transferring the domicile of the mother and children from the parish of Rapides to that of Carroll. Now, the law is positive that in all cases concerning minors, the judge referred to in our legislation, is *the judge of the parish within whose jurisdiction the minors reside*. Bullard & Curry's Digest, p. 580, No. 8. Civ. Code, art. 289. The Code of Practice, art. 944, says, that "the appointment of a tutor or curator to a minor belongs to the Judge of Probates of the place of domicile or usual residence of the father and mother of such minor, if they, or either of them, be living." This point is, in our opinion, so clear, that it does not require any further comment, particularly as it seems to have been settled in our jurisprudence by several decisions of this court. See 14 La. 484, and the cases of *The State v. The Judge of the Court of Probates of New Orleans*, 2 Robinson, 160, 418.

We conclude, therefore, that the appointment of the appellee as tutor to the opponent's minor children having been made by the judge of a parish in which the minors had for some time ceased to reside, was illegal and void for want of jurisdiction, and that it ought to be set aside.

It is therefore ordered, that the judgment appealed from be annulled; that the appellant's opposition be maintained on the ground of want of jurisdiction; and that the appointment of the appellee as tutor to the minor children of R. Winn, deceased, be set aside. The appellee paying the costs in both courts.

Exchange and Banking Company of New Orleans v. Boyce.

THE EXCHANGE AND BANKING COMPANY OF NEW ORLEANS v.
HENRY BOYCE.

The certificate of a notary, that no note signed or endorsed by a particular person, was protested by him within a certain period, is inadmissible. A notary can only certify copies of proceedings in his office; any other fact, within his knowledge, must be disclosed under oath.

Where it clearly appears that defendant intended to authorize a third person to endorse certain notes in his name, he will be bound by such endorsement, though the letter of attorney were received by his agent after the endorsement. The authority, subsequently received, would amount, at least, to a ratification of the act of the agent.

When the rate of interest to be charged by a Bank on loans or discounts, is limited by its charter, it cannot stipulate for a higher rate on the amount of any loan or discount, in consideration of its forbearance to sue.

Where a party resides at two places, alternately, being generally at one during one portion of the year, and at the other during the rest, but goes frequently from one to the other, notice of protest, directed to either, will be sufficient.

APPEAL from the District Court of Rapides, *King, J.*

MORPHY, J. The defendant is sued as the endorser of three notes for \$533 34 each, drawn to his order by Lewis J. DeRussy, dated at Natchitoches, the 14th of February, 1840, and payable twelve months after date, at the office of the Exchange and Banking Company of New Orleans in Natchitoches, with interest at ten per cent per annum, from maturity until paid. He is also sued on a note of \$454 55, dated the 16th of May, 1840, payable forty-five days after date, at the same place, and with the same interest from maturity, as the three other notes. The answer, after a general denial, avers that, in the year 1839, the defendant and others did each endorse three notes of \$800 each, payable in one year, which the Exchange and Banking Company of New Orleans agreed to discount for Lewis G. DeRussy, the maker thereof, at their usual rate of discount; and that the Bank agreed, if he would pay up one-third of that loan, that they would renew two-thirds of it, or two of the notes, for one year longer; and that if, at the end of that time, one of the remaining notes should be paid, the Bank would renew the other for one year more; and that this was to be done at their usual bank interest or discount. The answer further alleges, that the defendant, being away from home, authorized Michael Boyce to renew the two remaining notes of \$800 each, by en-

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dorsing new notes, signed by Lewis G. DeRussy, with his (defendant's) name as endorser, in the event of DeRussy paying one note of \$800 at maturity, according to the agreement; but that DeRussy did not do so, by reason whereof the security of the defendant against loss was diminished. The defendant alleges that the remaining notes were not paid, nor protested at maturity, nor renewed in any manner when due; and that the Bank granted to DeRussy an extension of time without his consent and knowledge, by reason of all which he is released and exonerated from all liability to the plaintiffs. There was a judgment in the inferior court in favor of the latter on the three notes of \$533 34 each, and against them as in case of nonsuit on that of \$455 55; and the defendant has appealed.

On the trial, the defendant offered certificates of Williams, a notary public, and of Greneaux, the Parish Judge, both living in the town of Natchitoches, to prove that no protest had been made of any note of Henry Boyce, by either of them, during the month of February, 1840. The plaintiffs opposed the introduction of these certificates, on the ground that they did not, of themselves, make evidence of the fact therein stated, and that the depositions of these functionaries should have been taken under a commission. We think that the judge decided correctly. Notaries can only legally certify copies of proceedings in their offices; any other fact within their knowledge, must be disclosed under oath. 10 La. 59.

The appellant's counsel has contended that no authority has been shown from him to Michael Boyce, his brother, to endorse the notes sued on; that they purport to have been executed on the 14th of February, 1840, while the power of attorney produced appears to have been signed on the 13th, at New Orleans, and that, therefore, the endorsements were not made under this power, which could not have reached Natchitoches in one day. From the power of attorney it is clear, that the defendant intended to authorize Michael Boyce to endorse the very notes sued on. He describes them so as to leave no reasonable doubt on the subject. If his brother endorsed these notes without waiting for the power, which, perhaps, he knew the defendant was to send him, the power afterwards received by him at Natchitoches, might, at least,

be considered, as a ratification of his act ; and the defendant cannot now be permitted to repudiate these endorsements, on the ground that they were unauthorized. But it appears to us that, as the evidence shows that the defendant was an accommodation endorser, and that these notes were given in renewal of other notes which bore interest at only seven per cent per annum, to which rate, on loans or discounts, the plaintiffs are restricted by their charter, they could not legally stipulate a higher rate of interest, for their forbearance to sue, on the delay of the parties to reimburse the funds thus advanced on this loan or discount.

It has, lastly, been contended, that the notices of the protest of these notes are insufficient, because they have been sent to Cotile, instead of Alexandria, the nearest post office to the defendant's residence. The record shows that the defendant has no fixed residence throughout the year, in any particular place. He has a plantation near Cotile, and in the summer season resides in the pine woods near it, while at other seasons of the year, he is said to reside on the bayou Rapides, four or five miles from Alexandria, where he receives his letters and papers. His plantation is about four miles from Cotile, and he visits it very frequently. Two witnesses, one a notary public, and the other the Parish Judge of Rapides, say that they consider it necessary to address notices of protest to the defendant at Cotile, and on bayou Rapides, it being doubtful at which of these places he actually resides ; while other witnesses consider his real residence to be at his plantation, or at his house in the pine woods, two or three miles from the post office at Cotile. All of them testify that he resides alternately at the house of Mrs. Archinard, his mother-in-law, on bayou Rapides, and at his place in the pine woods ; and that he is continually going from one place to the other, when not in New Orleans, where he frequently is during the winter. The evidence shows, moreover, that he was in New Orleans in February, 1841. Under these circumstances we believe that a notice at either place would be good.

It is, therefore ordered, that the judgment of the District Court be so amended as to bear interest only at seven per cent per annum, instead of ten, from the 14th of February, 1841, until paid ;

Hawkins, Administrator, v. Brown and another.

and that it be affirmed in all other respects. The costs of this appeal to be borne by the plaintiffs and appellees.

Hyams, for the plaintiffs.

Flint, for the appellant.

THEOPHILUS HAWKINS, Administrator, v. JESSE P. BROWN and another.

Where an action commenced by an administrator, is carried on, after the expiration of his administration, by the heirs, the defendant cannot examine him as a party, by annexing interrogatories to an amended answer. The term of his administration having expired, he had no interest in the case, and cannot be interrogated as a party. In an action for the price of a slave, the jury, if satisfied that he was addicted to theft, may either rescind the sale, or grant an abatement in the price.

As a general rule, the deposition of a witness cannot be read, if his personal attendance can be procured.

The deposition of a witness, to whom cross-interrogatories were propounded by the opposite party, having been taken *de bene esse*, and returned into court, the latter objected to its admissibility, on the ground that the witness, who was within the jurisdiction of the court, should have been produced in person. *Held*, that the depositions were inadmissible; and that it could not be inferred from the fact that no objection was made to the depositions previous to the trial, that the opposite party intended to dispense with the personal attendance of the witness.

Parol evidence is admissible to show that the vendor made known, at the time of the sale, the defects of the thing sold.

APPEAL from the District Court of Rapides, *Boyce*, J.

This case was submitted, without argument, by *Flint*, for the appellant.

BULLARD, J. This is an action to recover the price of two slaves, sold at public auction as a part of the estate of the plaintiff's intestate. The defence is the existence of redhibitory vices and defects. The case was before this court some years ago, and remanded with instructions to the judge not to allow evidence of the crier's declarations unauthorized by the vendor, nor of the conversations of bystanders with the defendants, unless they tend to show, that the redhibitory vices and defects in the slaves were declared by the vendor to the vendee, before, or at the time of the sale. 7 La. 417.

Hawkins. Administrator, v. Brown and another.

A second trial resulted in a verdict and judgment against the defendants, from which Flint, the surety, has appealed.

The appellant has called our attention to several bills of exception, upon which he relies for a reversal of the judgment. The first is to the refusal of the judge to order Hawkins, the former administrator, who had brought the suit in that capacity, to answer certain interrogatories annexed to an amended answer. It was refused, on the ground that Hawkins had no interest in the suit, that his term of administration had expired, and that the suit was prosecuted by the heirs of Grimball, whose estate he had administered. It is clear that interrogatories can only be administered to a party, and if Hawkins had ceased to be so in his representative capacity, he could not be interrogated in the manner proposed.

The second bill is to the charge of the court to the jury. The jury were instructed that, if they were satisfied that one of the slaves was addicted to theft, they might abate the price, or grant an entire rescission of the sale, as they should think proper. The court, in our opinion, did not err. The appellant cannot justly complain, that the judge, after telling the jury that they might rescind the sale if they thought the redhibitory vice existed, which was all he could ask, added that they might diminish the price, and thereby give the defendants partial relief.

A third bill was taken to the admission of Boone's deposition, which was objected to on the ground that the witness was a resident of the parish, and not absent, and that the defendants had given notice to the plaintiff's counsel that they should object to the reading of the deposition. The objections were overruled, it appearing that the defendants had put interrogatories to the witness, that the deposition had been filed a long time in the record, and that no objection had been made to the form; and because it appeared to the court that the object of the parties was to dispense with the personal attendance of the witness.

It is undoubtedly a general rule, that the deposition of a witness cannot be read, if his personal attendance can be procured. The Code of Practice seems to contemplate the taking of depositions in certain cases, where the party is within the jurisdiction of the court. It does not appear, in this case, but that the deposition was intended to be only *de bene esse*, and, in our opin-

Hawkins, Administrator, v. Brown and another.

ion, the court erred in admitting it. It cannot be inferred from the defendants' having crossed the interrogatories, or not making the objection sooner, that they intended to dispense with the personal attendance of the witnesses, if within the reach of the process of the court.

There was a further objection to the testimony of Boone, which was overruled by the court. The objection was, that parol evidence was inadmissible of declarations made by any person at the auction sale, in relation to the warranty of the slaves, or their vices. That the written terms of sale must have been read, and that no proof could be given of any other, so as to modify the warranty. But the evidence was admitted, only to prove declarations made by Thomas Grimball, one of the heirs, and by any other heir, and proclaimed at the instant, the court considering the heirs as substantially warrantors. The court, in our opinion, did not err. That kind of evidence was admissible to show that the vendor made known, at the time of the sale, the defects of the thing sold; and its admission conforms to the instructions of this court when the cause was remanded. The only valid objection was to the absence of Boone.

We have thought proper to notice and express our opinion on the several questions of law brought to our attention by the bills of exception, inasmuch as the case must be remanded for a new trial, in consequence of the erroneous admission of Boone's deposition.

The judgment of the District Court is, therefore, reversed; and it is ordered that the case be remanded for a new trial, with instructions to the judge not to admit the depositions of Boone, unless upon showing that his personal attendance cannot be procured. The appellee to pay the costs of this appeal.

BELVIDERE ELIZA TIPPETT and Husband v. HAMILTON JETT.

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The first settlement between heirs or partners, by which a state of *indivision* is terminated, is, in substance, a partition.

In all actions of rescission, the party seeking relief must have offered to restore his adversary to the situation he was in before the contract.

An action for the nullity or rescission of partitions, is prescribed by five years. C. C. 3507.

APPEAL from the District Court of Rapides, *Lewis, J.*

The plaintiff Belvidere Eliza Tippett, assisted by her husband, presented a petition, representing that Elizabeth, the wife of Hamilton Jett, died some years previously, intestate; that at the time of and prior to her marriage, she was the owner of a tract of land in the parish of Concordia, which was, subsequently, sold by herself and husband to one Hunt, for \$1800; and that the amount was received by the defendant, and applied to his own use. That at the time of her death, her mother, E. Jett, was the owner of a female slave and her five children, the slave and two of her children having been purchased with the separate property of petitioner's mother. That her mother left community property, to the value of \$12,000. That the defendant kept possession of the whole estate, converting the fruits arising therefrom to his own use. That he caused no inventory to be made, and never rendered any statement of the amounts paid or received by him on account of the succession.

B. E. Tippett, further represents, that she is the sole heir of the deceased. That with a view to a partition and settlement of the succession, she entered into a written agreement with the defendant on the eighteenth of April, 1825, before the Parish Judge, by which the latter conveyed to her six slaves, in consideration whereof she relinquished, in his favor, all her right, interest, and claims to the succession of her mother. That the slaves so conveyed were partly community property, and, in part, the separate property of her mother, and were worth, at the time, but about \$1800. That she was then ignorant of the value of the succession. That she has suffered a loss exceeding one-fourth of its value, and that the agreement is void, for lesion and fraud on the part of the de-

defendant, who well knew and fraudently concealed the value of the estate. The petition further alleges, that the defendant has converted the whole succession to his own use, except the six slaves before mentioned; that petitioners are entitled to recover from him \$1800, with interest from the opening of the succession; one-half of the succession itself, worth \$6000; and the slave above named, with her five children. A partition of the community property is prayed for, and an attachment against the property of the defendant as a non-resident. Interrogatories were also propounded to one Maddox and J. M. Jett, as garnishees.

The defendant denied, generally, all the allegations in the petition, and specially that B. E. Tippett is the legal heir of his deceased wife. Prescription was pleaded in an amended answer.

There was a judgment below, rescinding the agreement of the eighteenth of April, 1825, for lesion, and, there being no property within the jurisdiction of the court to be divided in kind, in favor of B. E. Tippett for \$6934 60, the balance due on her interest in the community property. Judgment was also given in her favor against the garnishees, for the amounts due by them, respectively, to the defendant, H. Jett. The defendant and garnishees have appealed.

Dunbar, for the plaintiffs. This is an action to rescind a partition, for lesion beyond a fourth. No matter by what name a contract of partition may be called, where a question of lesion arises, the contract will be considered a partition. Code of 1808, p. 206, arts. 250, 253. *Goodwin v. Chesneau's Heirs*, 2 Mart. N. S. 409. Art. 254, Tit. 2, Book 3d. of the Code of 1808, p. 206, which declares, that, "the action of rescission is not admitted against a sale of hereditary rights, made without fraud, to one of the heirs and at his risk, by the other co-heirs, or by any of them," refers to sales expressly without warranty, and is inapplicable to the present case. The rules are the same, as to partitions between coproprietors and co-heirs. This action can only be prescribed by the lapse of ten years. Code of 1808, p. 206, art. 259; p. 302, art. 204; p. 366, art. 115. Civil Code of 1825, arts. 1451, 2218.

Elgee, contra.

BULLARD, J. A re-hearing was allowed in this case at a former term, the court having at first held that the attachment must be

Tippett and Husband v. Jett.

dissolved on the ground that no property had been attached, the garnishees having sworn that they had been notified of an assignment by the defendant, to Stockman and Knight, of the debts attached in their hands.* Upon further consideration, we are of opinion that it is sufficiently shown that the assignment was fictitious and conferred no right, and, consequently, that the attachment must be sustained, and the judgment below examined on the merits.

The plaintiff, B. E. Tippett, who is the sole heir of the defendant's late wife, who was in community with him, sues to recover \$1800, the price which she alleges the defendant received for a tract of land in Concordia, sold by them after the marriage, but which belonged to her mother, and to annul and rescind an alleged partition between her and the defendant, for lesion beyond one-fourth. The sum of \$1800 is sworn to as a debt upon which the attachment was ordered, and the action of rescission was engrafted upon it. The judgment of the District Court was for the plaintiffs, and the defendant has appealed.

The evidence is wholly insufficient, in our opinion, to prove the debt of \$1800. It is supported only by the oath of one witness, who, notwithstanding an objection to parol evidence in such a case, was permitted to testify to the ownership by Jett's wife of a tract of land in Concordia, to its sale by Jett and wife after their marriage, and that the price was \$1500 or \$1800, and was received by the husband.

The contract between the parties, which the plaintiffs contend was intended to put an end to their joint interest in the community of *acquêts* and gains, and consequently was a partition subject to be rescinded for lesion beyond one-fourth, bears date April 18th, 1825. It recites that H. Jett, for the consideration therein expressed, has sold, transferred, and delivered to the plaintiff, Belvidere Eliza Tippett, six slaves, whose names and ages are given. No price is mentioned, nor any valuation of the slaves. B. E. Tippett, on her part, relinquishes in favor of Jett, all her right, title, interest, and claim to the succession of her late mother, Eliza-

* The first opinion in this case, was delivered by *Martin, J.*, October, 1838. The opinion last pronounced has rendered its publication unnecessary.

beth Jett, the wife of the said H. Jett, abandoning all claim to the same, and acknowledging herself fully satisfied and compensated by the slaves above described.

H. Jett, by this act, admits the plaintiff's heirship, and cannot now be permitted to call it in question, without showing affirmatively that he was in error.

The contract between the parties is clearly not a sale. No price is fixed for the slaves. It appears to be one rather of exchange, Jett giving six slaves in exchange for B. E. Tippet's right, title, interest, and claim to or in the succession of her mother. But, whatever may be the form of the act, it is well settled, that every first settlement between heirs or partners by which a state of indivision is terminated, is, in substance, a partition. 3 La. 188.

In the case here referred to of *The Syndics of Morgan v. Davenport's Heirs, &c.*, Morgan and Cortes had been partners in trade. On the dissolution of the partnership, Morgan sold out his interest to his partner for \$10,000; and it was held that this was substantially a partition, and the lesion was alleged by way of exception, in an action on the notes given for the price of the sale.

That there did exist a community of *acquêts* and gains between H. Jett and the mother of the plaintiff B. E. Tippet, is clearly shown, and, we presume, the slaves given to her belonged to that community. The effect of the contract was to vest in Jett a title to all the property in which they were jointly interested, in consideration of six slaves, and an exemption, on the part of B. E. Tippet, from all debts due by the community.

It is, however, contended, that the contract is a cession of hereditary rights to a co-heir, and, consequently, without warranty, and not subject to rescission for lesion.

B. E. Tippet appears to us to have placed herself in a dilemma, from which it is difficult to escape. If her contract with Jett was a partition, and subject to rescission for lesion beyond a fourth, she cannot succeed, because she has neither averred nor proved an offer to restore the slaves received by her as her share; and it is a general rule in all actions of rescission, that the party seeking relief must offer to restore his adversary to the situation he was in before the contract. He who seeks equity, must do equity. If, on the contrary, the contract be regarded as one of exchange, the

same principle applies, and the contract cannot be rescinded without placing the parties *in statu quo*. In either case, Jett would be entitled to a restoration of the slaves, given by him as a consideration for B. E. Tippet's interest in her mother's estate; and, if a new partition is to be made, he has a right to require that the property shall be partaken in kind, so far as it is practicable, and this could not be done without bringing back the slaves, which she has not shown herself either able or willing to do.

But even if it were doubtful whether that principle applies to the case before us, yet we are clearly of opinion that the present action is barred by the prescription of five years, according to article 3507 of the Civil Code, which declares that "the action of nullity or rescission of contracts, testaments, or other acts; that for the reduction of excessive donations; that for the rescission of partitions and guarantee of the portions, are prescribed by five years," &c. The contract between B. E. Tippet and Jett bears date April 18th, 1825, and the attachment was served in this suit May 23d, 1831.

The judgment of the District Court is, therefore, avoided and reversed; and it is further ordered that there be judgment for the defendant, with costs in both courts.

APOLLINAIRE BAILLIO v. DAVID BURNAY and another.

To recover against a mere trespasser, who sets up no title in himself or in any other person, it is unnecessary that the plaintiff should show a title, perfect in all respects; one apparently good will suffice.

Where it is proved that the land claimed by the plaintiff would be equally, or more valuable to him with the timber on it, defendants, who were mere trespassers, will not be allowed any thing for the expense incurred by them in clearing it.

APPEAL from the District Court of Rapides, *King, J.*

Hyams, for the plaintiff.

Brent, for the appellants.

GARLAND, J. This suit is brought to recover a tract of land fronting on Red River, being lot No. 35, in township No. 4, north range No. 1 west, containing 134 $\frac{1}{2}$ acres, with the rents and

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fruits. The plaintiff claims title by different mesne conveyances from one Louis Huet or Wite, who purchased from the United States. The defendants set up no title to the premises in their answer, nor do they pretend to have any. They are, therefore, trespassers.

The plaintiff exhibits a regular chain of deeds from Huet to himself, the receipt of the Receiver of Public Moneys, and a certificate from the Register of the Land Office at Opelousas, showing that the United States had parted with their title to the land, and that the party was entitled to a patent for it. The deed to the plaintiff is dated on the 22d of December, 1836, previous to any possession proved in either of the defendants. They exhibit no title, but prove, by parol evidence, that they have been for some time in possession of the land, and that, notwithstanding the institution of this suit, they have gone on to clear, cultivate, and improve it; and they claim the value of their improvements. The plaintiff shows that on his lands adjoining, there is a great scarcity of timber, and that this land is very valuable on that account. The evidence shows that to the plaintiff the land would be nearly, if not quite as valuable with the timber standing on it, as after having been cleared; and, further, that the defendants have cut and carried away, or destroyed, a quantity of the best timber. It is shown that the cleared land is worth to the defendants a rent of four dollars per acre per annum, and the number of acres which each defendant has in possession is established. It also appears that Burney has made and carried off the premises a large number of rails.

There was a judgment for the plaintiff for the land, and for rent since the service of the citation, and against Burney for the value of the rails. From which both defendants have appealed.

In this court, the counsel for the defendants has urged, that the judgment of the District Court should be reversed, because the title of the plaintiff is null and void, he having purchased a pre-emption right under the act of Congress of June 19, 1834, previous to the issuing of a certificate of purchase, which he alleges is prohibited. The evidence shows that the proof of the right of pre-emption was made previous to the date of the deed, although, from some cause, the purchase was not actually completed until

Baillio v. Burney and another.

afterwards. The plaintiff is not the vendee of the pre-emptor, but is a third purchaser from him, and there is no allegation of any collusion or unfairness. It is not necessary for us, under these circumstances, to investigate the question raised by the counsel. If there be a defect in the plaintiff's title, it is not one with which the defendants have any thing to do. They are trespassers, and to recover against them, it is not necessary to show a title perfect in all respects. *Patin v. Blaise*, 19 La. 396. If there be defects in the plaintiff's title, it does not become the defendants to assert it, who set up no title in themselves nor any better one in any other person. The ground taken by this court, in the case of *Bedford v. Urquhart, &c.*, meets our approbation now, and it is time to let it be understood, that one man cannot, without title, or the assertion of a better title in another, take possession of the property for which a third person has paid his money, and to which he has apparently a good title, and then call on the complainant to exhibit his titles, and, when exhibited, commence a search for defects, and if every link in the chain be not perfect, keep possession without a legal or equitable right in himself. This court will protect every man in the rights which the law gives him, but it will not aid any one in retaining the possession of that to which he exhibits no right, or does not, even on the record, assert a claim. This case is different in several essential particulars from that of *Strong v. Rachal, &c.* (16 La. 232); and, in relation to the question of improvements made since the commencement of the suit, is in accordance with the principles settled in the case of *Pearce, &c. v. Frantum*, 16 La. 414, 423.

Judgment affirmed.

Blinco v. Grimball and another ; &c.

IN the cases of *Joseph Blinco v. John D. Grimball and another*, and *Edward Simon v. Jacob W. King*, from the District Court of St. Mary, decided at Opelousas ; and of *Andrew E. Crane v. Felix Bosworth and another* from the District Court of Carroll, *William R. Taylor and another v. George W. Lovelace and another* from the District Court of Catahoula, and *Bernard Hemken v. Maberry Wafer* from the District Court of Claiborne, decided at Alexandria, the judgments of the lower courts were affirmed, with damages for frivolous appeals.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF LOUISIANA,
IN THE
EASTERN DISTRICT, AT NEW ORLEANS,
COMMENCING, NOVEMBER, 1842.

PRESENT :

HON. FRANÇOIS XAVIER MARTIN.
HON. HENRY A. BULLARD.
HON. ALONZO MORPHY.
HON. EDWARD SIMON.
HON. RICE GARLAND.

JOHN KELLAR v. THOMAS WILLIAMS.

On a rule against one who had been appointed, by consent of parties, to receive and sue for all debts due to the partnership of which plaintiff and defendant were members, to show cause why he should not pay the amount so received by him into court, he may introduce evidence to show that he had paid debts due by the partnership, without first showing any authority to do so from the parties, or from either of them. A party cannot be controlled as to the order of introducing the testimony in support of his case. The authority to pay might be afterwards proved.

Though a receiver, appointed to collect money due to the parties to a suit, have no authority to pay debts due by them, yet if they know that he is doing so, and do not object at the time, they cannot do so afterwards.

Where, on the motion of one of the parties to a suit, with the consent of the other, a third person is appointed by the court to receive and sue for all amounts due to the litigants, on giving bond, with security, to hold the amounts so received subject to the order of the court, he will not be considered an officer of the court, but the agent of the parties, and only responsible as such. The appointment is the act of the parties.

APPEAL from the District Court of the First District, *Buchanan, J.*

GARLAND, J. On the 6th of July, 1836, Kellar commenced a suit against Williams, alleging that they were partners in business, and that by the bad management and misconduct of the latter, the partnership affairs were in great confusion, his interests sacrificed, and the firm rendered insolvent. He prayed for the dissolution of the partnership, to which, he alleges, Williams is largely indebted, for a settlement of the accounts, and for a judgment for \$5000 damages. The next day Williams commenced a suit against Kellar, making various allegations against him, also praying for a settlement of their accounts, for a dissolution of their partnership, and for a judgment for a balance due. Kellar, in his petition, prayed that Williams might be held to bail for his appearance, and the latter, in return, prayed in his petition, that all the property might be sequestered, with both of which requests the judge below complied. Having thus got all their property and accounts into a situation in which neither could do any thing with them, and having the prospect of a litigated and protracted suit before them, on the 30th of July, 1836, the counsel of Kellar, in the presence of and without objection from the counsel of Williams, moved the court, that "Thomas Powell be appointed receiver of the moneys and debts due to the firm of Williams and Kellar, with power to sue for and recover the same," on his giving bond and security in a sum fixed, with condition that he should "have the moneys received by him, forthcoming, and subject to the further order of the court." The books and papers were ordered to be delivered to this receiver.

It appears from the record, that, on the 14th March, 1837, the case of *Williams v. Kellar* was called for trial, and a judgment of nonsuit entered; yet it is now argued as if that case were pending, although no appeal was taken from the judgment. Some short time afterwards, auditors were appointed to adjust the accounts in the case of *Kellar v. Williams*, but not having acted, after a lapse of nearly two years, others were appointed, who in March, 1839, made a report, which in March, 1840, was homologated, but shortly afterwards set aside, and again referred to the same auditors, who, in June of the same year, presented another

Kellar v. Williams.

report, by which it appeared that Kellar was a creditor of the firm, and Williams considerably indebted to it.

To this report, Williams made opposition on various grounds, which are yet undecided ; but in no part is it specially alleged, that he is not a debtor. Kellar, who is a creditor of the firm, prays that the report may be homologated, but no trial has yet taken place on that question. Some months afterwards, the counsel of Williams, although, as appears by the report of the auditors, his client was largely indebted to the firm, took a rule on Powell, who had been appointed receiver for the firm of Kellar and Williams, to show cause why he should not pay into court the sum of \$12,101 47, money collected by him for the firm, and render an account of the moneys received by him as receiver. To this rule Powell answered, that he had collected about the sum mentioned, but that at the request of both Williams and Kellar, he had paid various debts of the firm, which had exhausted all the funds in his hands, and left a large balance in his favor. With this answer, an account in detail of the payments made was presented, to which both Kellar and Williams made opposition, on the grounds, that the payments were improperly made, as Powell had no right to make them ; that the debts he pretended to have paid, were not those of the firm ; and, lastly, that no payments were ever made at all. With this account, a great number of vouchers were filed, to prove debts and payments. The judge below rejected them all, and directed Powell to pay into court the sum of \$12,101 47, stating that the proof of the payment of debts was inadmissible, unless the consent of both or one of the parties was shown. That such payments might give Powell the rights of a creditor by subrogation, but could not be urged as an answer to the rule, which alone concerns the accountability of an officer of the court. From this judgment Powell has appealed.

Our attention is first directed to various bills of exception, taken by the counsel of Powell, on the trial. The first states that Powell offered to prove that he had paid the debts of Kellar and Williams, and that the debts were justly due as set forth in the account filed, which evidence the court rejected, unless Powell should first show that Kellar and Williams, or one of them, had agreed to the payment of each note and account so paid.

It has been often held by this court, that parties ought not to be controlled as to the order in which they may choose to introduce their testimony ; therefore, the court below ought not to have rejected evidence of the reality and validity of debts owing by Kellar and Williams, and paid by Powell, because it was not first proved that such payments were made by the consent of one or both of the parties. This might have been shown afterwards. It is very certain that, under the appointment of Powell, as first made, he had no right to act as a liquidator of the firm, and pay such debts as he thought proper to admit, as due by it ; but if he were afterwards authorized to do so by the parties, or if they knew that he was doing so and did not object to it at the time, they cannot now object, and say that he is not entitled to a credit for the payments made for their benefit. They must not enrich themselves at his expense ; nor have they a right to compel him to pay money into court, and let it remain there until he shows that he has a right to take it out again. In the rule taken on the appellant, it is not alleged or pretended that the money is in unsafe hands, nor that the bond and security given are insufficient, nor that there is any danger of the amount being lost. The party is simply called upon to show cause why he should not pay it into court ; and we think it a very good answer, that he has applied the amount to the benefit of the firm whose agent he is. We will not say, at this time, what effect the evidence given, as to the assent of Kellar and Williams to the payment of the debts, ought to have ; but we are of opinion that the District Judge mistook the capacity in which Powell acted. We do not regard him as an officer of the court, but simply as the agent of the parties, and entitled to show that he has faithfully acted as such. If his powers have been exceeded, he must be responsible ; but until that is shown, it is not proper to force him to pay first, and try his case afterwards. We think the judge erred in rejecting the testimony.

The second bill of exceptions is, in principle, the same with the first. It is taken to the refusal of the judge to permit certain judgments against Kellar and Williams, paid by Powell, to be given in evidence, unless it were first shown that the partners, or one of them, had authorized their payment. We think the judge erred, in rejecting the evidence. The third bill of exceptions, is

to the refusal of the judge to permit the books of the firm to be given in evidence, to prove its insolvency, and the justice of the debts paid. We think the judge again erred. One of the allegations in Kellar's petition, is, that the firm is insolvent, and we can see no possible objection to giving the books in evidence to prove it, and the justice of the debts paid for the firm.

As to the authorities urged upon us, as to the powers and duties of receivers in courts of chancery, we think, if entitled to any weight, that they are not applicable to the present case. A reference to the appointment of Powell as receiver, will show that it was the act of the parties themselves; and the minute or record book was used, to record the authority conferred. The want of confidence between the parties made it necessary to appoint an agent to settle their affairs, and he is only accountable as other mandataries.

As to the argument, that the issues in this case have been changed, or a new direction given to them, we can only say, it is the act of the parties themselves. They have provoked this controversy with Powell, which does not in any manner arrest the decision of the case between themselves, if they choose to go on with it. Nor does the complaint of the injury that creditors might sustain, by sanctioning Powell's course, seem to us entitled to consideration, as no such persons present themselves to claim our protection. When they do so, it will be time enough to take care of their interests.

If it be true, as suggested by the judge, that Powell has been subrogated to the rights of the creditors he has paid, this case is similar in principle to that of *Rodriguez v. Dubertrand*, 1 Robinson, 535.

The judgment of the District Court is, therefore, reversed; and the cause remanded for a new trial, with directions to the judge to admit the evidence stated to have been rejected in the three bills of exception, and otherwise to proceed according to law; the appellees paying the costs of this appeal.

C. M. Jones, and L. Peirce, for the appellant.

Hoffman, contra.

JOSEPH W. MEEKS v. JOSEPH E. DAVIS. .

The holder of an accepted draft for a sum payable in the notes of a particular Bank, protested at maturity, will be entitled to recover the value of the notes at the date of the protest. A subsequent tender of the amount in the notes of the Bank, they having depreciated in the mean time, will not entitle the defendant to settle the debt, at the value of the notes at the date of the tender.

APPEAL from the Commercial Court of New Orleans, *Watts, J.* This was an action against one of the acceptors, by the payee of a bill, for \$434 25, payable "in funds equivalent to Mississippi Union Bank post notes," protested at maturity, on the 3d June, 1839. The defendant averred that he had always been ready to pay the bill, and that he had actually rendered the amount to the agent of the plaintiff. On the trial, Nicholson testified, that he had presented the bill to the defendant, on the 29th December, 1840, and demanded payment; that the latter offered him Mississippi Union post notes, dollar for dollar; and that these notes were then at a discount of from 60 to 70 per cent. Witness did not know the value of these notes on the 3d of June, 1839, but had seen from an entry in the books of certain brokers that they had sold them, on the 8th of August, 1839, at a discount of seven per cent. Grant, a broker, testified, that he had sold the notes in Mississippi, about the middle of May, 1839, at six per cent discount; that they had been sold in New Orleans, on the 20th of that month, at from five to eight per cent; and that in December, 1840, they were at a discount of thirty or forty per cent. Egerton, another broker, deposed, that in May and June, 1839, the notes were sold at from five to ten per cent discount. There was a judgment for the full amount of the bill, with interest and costs of protest, in specie; and the defendant has appealed.

Emerson, for the plaintiff. The value of the notes at the maturity of the draft, is the standard by which to fix the amount due. Civ. Code, art. 2148.

Preston, for the appellant.

MARTIN, J. The petition states, that the plaintiff being the holder of an order or bill, by which the defendant was required to pay the sum of \$434 25, in funds equivalent to Mississippi Union

Bank post notes, the latter accepted the same. At the maturity of the bill, which was payable, one day after sight, at the Commercial and Rail Road Bank of Vicksburg, the plaintiff presented it there for payment, which, not being made, it was duly protested. The answer admits the defendant's liability to pay the amount stated on the face of the bill, and avers his constant readiness to do so. The plaintiff had judgment for the amount of the bill, interest and costs, and the defendant has appealed. The bill was accepted on the 30th of May, 1839, and protested on the 3d day of the following month. On the back of it is an endorsement, dated December 29th, 1840, which states, that, on that day, John L. Nicholson presented the bill to the defendant, who tendered him the amount of principal and interest in Mississippi Union Bank post notes, answering the description of those named in the draft, which was refused. Nicholson deposed according to what he had written on the back of the bill; and, farther, that the defendant offered him a \$500 Union post note, and requested him to take there-out the amount of the bill. The defendant offered Union post notes, dollar for dollar, which were at the time at a discount of from sixty to seventy per cent. Defendant gave evidence of the value of the Mississippi Union Bank post notes on the day of the protest; and the judgment is for the value of the amount of the bill on that day. The defendant's counsel has contended that the court erred, and that the judgment ought to have been for the value of the notes on the day on which the first application for payment was made to him. He contends that the document sued upon is not a bill of exchange, it being of the essence of such a bill that it should be payable in money, and not in anything else; and that it is a contract for the delivery of a specific article, for the non-delivery of which no damages can be claimed from him, unless he has been legally put *in mora*, before the institution of the suit. The plaintiff's counsel has replied, that a protest by a notary public is one of the modes pointed out by the Civil Code, art. 1905, for putting the debtor *in mora*. The protest in the present case has been admitted in evidence, without opposition on the part of the defendant. The judge, therefore, did not err in giving judgment for the plaintiff.

Judgment affirmed.

HARRIET MARSHALL v. MICHAEL MULLEN and others.

Real property purchased during the existence of the community of *acquêts*, but conveyed to the wife, will be liable for debts contracted by the husband, unless proved to have been paid for out of the paraphernal funds of the former.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Roselius*, for the appellant.

A. Hennen, for the defendants.

GARLAND, J. The defendants, having obtained a judgment against James Marshall, had an execution, issued under it, levied on a valuable lot of ground in this city, whereupon the plaintiff obtained an injunction, alleging the lot to be her paraphernal property, that she had been separated in property from her husband, and that the lot was not liable for his debts. The defendants deny all the allegations, and charge fraud and collusion between the plaintiff and her husband.

In the court below, it was clearly shown that the lot in question was purchased during the existence of the community of *acquêts*, but conveyed to the wife. It was also attempted to be proved, that it had been paid for with her paraphernal funds; but the judge thought that allegation not sufficiently established, and dissolved the injunction. The plaintiff, also, relied upon her judgment of separation of property, but was met by the objections that it had never been advertised or executed according to law, and that it was not of itself evidence against the defendants, they having charged fraud and collusion between the parties, and the judgment being one by confession. From the judgment dissolving the injunction, the plaintiff has appealed.

We are of opinion that the inferior judge did not err. We can find no evidence to satisfy us that the lot was paid for out of the paraphernal funds of the wife. The deed of sale does not show it with any certainty, and there is no other evidence to prove it. In his written argument, the present counsel for the plaintiff states, that he is informed that such evidence was given in the court below; but it is not in the record, and the clerk and judge certify that it contains all the evidence upon which the cause was tried.

Thorne and another v. Egan and Husband.

As the case now stands, all the principles involved in it have been settled in the cases of *Terrell v. Cutrer*, and *Bertie v. Walker*, 1 Robinson, 367, 431.

Judgment affirmed.

ROBERT H. THORNE and another v. BRIDGET EGAN and Husband.

A married woman, who is a public merchant, may bind herself for any thing relative to her trade, without being empowered by her husband; and in such a case, if there be a community of *acquêts* the husband will be also bound. C. C. 128. Otherwise, if not a public merchant.

The authorization of the husband to the commercial contracts of the wife, is presumed by law, whenever he permits her to trade in her own name. C. C. 1779.

The wife cannot deprive the husband of the right to administer her dowry. He administers it for his own account, and not as her agent, and is not accountable to her for the profits or revenues derived from it. C. C. 2329, 2330. His obligations are those of an usufructuary. C. C. 2344. Debts contracted by him, during the marriage, as administrator of the dowry, are personal to him, and cannot bind the wife, if she renounce the community. C. C. 2379.

APPEAL from the District Court of the First District, *Buchanan*, J.

Eggleston and *L. Peirce*, for the appellants.

Molloy and *Preston*, for the defendants.

MORPHY, J. The defendants are sought to be made liable on a promissory note signed by Bridget Egan alone. It is alleged in the petition, that, at the time of its execution, there existed between the defendants a community of *acquêts* and gains; that Bridget Egan was a public merchant and trader, residing and transacting commercial business in the city of New Orleans; and that the note sued on was given by her in reference to her business and trade. The answer denies that Bridget Egan was a public merchant at the time she signed this note, (twenty-sixth October, 1840,) or that she had transacted any commercial business since her marriage with Owen D. Egan up to the period of her separation of property from her husband, in the autumn of 1841. It avers that the note was given to secure a debt, contracted by Owen D. Egan in the business in which he was engaged, and of which he had the sole

management. There was a judgment below in favor of the defendants, reserving to the plaintiffs their action against Owen D. Egan, for goods sold and delivered.

Had the facts set forth in the petition been supported by evidence, they would have presented a clear case in favor of the plaintiffs. Under our law, the wife, who is a public merchant, may, without being empowered by her husband, obligate herself in any thing relating to her trade ; and in such a case her husband is bound also, if there exist a community of goods between them. The authorization of the husband to the commercial contracts of the wife, is always presumed by law, when he permits her to trade in her own name. C. C. arts. 128, 1779. There is no evidence in this case, that Bridget Egan was a public merchant, when she signed this note, on the twenty-sixth of October, 1840. It appears, on the contrary, that since her marriage, which took place on the thirtieth of December, 1837, the business which she had until then carried on in her two clothing stores, was exclusively managed and conducted by her husband, whose name was put on the door of the stores ; and that the plaintiffs, who formerly kept their account with her, as the widow of one Finney, then kept it in the name of Owen D. Egan.

The counsel for the plaintiffs have contended that, as the two stores which she owned before her marriage, and which she settled upon herself as a dowry, were appraised, with a declaration that the valuation was not intended to transfer the property to her husband, she continued to be the owner of these stores ; that, if the business in them was afterwards carried on by Owen D. Egan, in his own name, he must be considered as her agent in their management ; and that she is liable, as the goods for which the note was given were placed in her stores, and thus enured to her benefit. It is clear that, as the law entitles the husband to the administration of the dowry, and as the wife cannot deprive him of it, he administers her dotal property for his own account, and not as her agent, and is not accountable to her for the profits or revenue he may derive from it. His obligations are those of an usufructuary. The clothing stores, which formed the dowry in this case, could not be otherwise used or administered, than by retailing the goods in them at the best possible prices, and renewing

the stock from time to time so as to do a profitable business. This the husband was unquestionably authorized to do. The debts which he may have contracted during the marriage, for the fulfillment of his obligations as administrator of the dowry, are personal to him, and cannot be binding on the wife, if she sees fit to renounce the community. C. C. arts. 542, 2329, 2330, 2344, 2379. It may be doubted whether, from the nature of the property brought in marriage by Bridget Finney, the valuation did not necessarily transfer it to the husband, notwithstanding the declaration that it was not intended to have that effect. But, be this as it may, it is clear, that a married woman is without capacity to contract; without the assistance of her husband, unless she be a public merchant carrying on a separate trade. The business in reference to which this note appears to have been given, was transacted by the husband alone; the wife had no share whatever in it, nor had she any right to interfere with it. She could only claim a restoration of the property, or its value, in a suit for a separation of property from her husband on showing, as she has done, that her dowry was in danger. C. C. art. 2399. As to Owen D. Egan, the judge below was of opinion, and we think correctly, that under the pleadings and evidence no judgment could be rendered against him in this suit. He was no party to the instrument sued on; and the plaintiffs have utterly failed to make out the legal grounds on which alone he could be held liable on it.

Judgment affirmed.

WILLIAM H. COOK and another v. WARREN WEST.

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A vendor may refuse to deliver the thing sold, though he may have granted a term for the payment, where, from the absconding of the vendee, he would be in imminent danger of losing the price. C. C. 2464.

A sale is perfect, between the parties, as soon as they agree as to the thing and the price. As to third persons, the property of the thing sold passes to the vendee, only by delivery.

A vendee who has not received the thing sold, nor paid the price, can transfer to a third person only his right to require the delivery of the thing on the payment of the price, or on giving security for its payment at the time agreed on.

One who stands by and sees his property sold as belonging to another, will not be permitted to set up his title in opposition to a *bona fide* purchaser, who has bought on the faith of his declarations or apparent acquiescence. *Aliter* where the purchaser knew the extent of the rights of the claimant, and was not misled by the acknowledgments so made.

APPEAL from the District Court of the First District, *Buchanan, J.*

Preston, for the appellants.

Warfield, for the defendant.

MORPHY, J. The petitioners claim, as their property, forty-six tons of hay, being the balance of a flat-boat load of that article, supposed to have contained about sixty tons, which they state that they purchased from one Elijah J. Wood, at the price of \$21 per ton. They aver that only fourteen tons of hay have been delivered to them, and that the forty-six remaining tons are in the possession of the defendant, who wrongfully detains the same. They pray for a writ of sequestration, and for judgment in their favor for the forty-six tons of hay, or the value thereof, to wit, \$966. The defendant sets up title to the hay in his possession, denying that either the plaintiffs, or E. J. Wood, have any right to it. The court below gave judgment in favor of the plaintiffs for the forty-six tons of hay, or its value, \$966; but subject to a deduction of \$920 for the defendant's privilege as vendor upon the property sequestered. The plaintiffs have appealed.

The record shows that, on the 24th of January, 1838, the defendant, being at Vicksburg, sold to one Elijah J. Wood, a flat-boat and its cargo of hay, at the rate of \$20 per ton for the hay, and \$55 for the boat, payable in United States paper, when delivered in good order at New Orleans, and for which the seller was to wait three days, but that he received an advance of \$150. That a day or two after the arrival of the boat at the levee in this city, Wood sold the hay to the plaintiffs at \$21 per ton, informed the defendant of the fact, and told him that he might commence rolling out the hay. When the defendant had delivered about ten tons, he told Wood that he wanted more money before he put out the hay. Wood promised to go to the plaintiffs and get some, which he would change into United States money, and give him in the afternoon. Under this assurance, the defendant con-

tinued rolling out the hay until he delivered about fourteen tons, which were taken away by Barrett, one of the plaintiffs; but defendant refused to deliver any more hay, when he found that Wood was not likely to return. The latter, it appears, had gone to the plaintiffs, and obtained from them, as an advance on the hay, \$700, with which he absconded, instead of giving the money to the defendant.

It is clear that, although the sale had become perfect as between the defendant and Wood, as soon as they agreed as to the thing sold, and the price to be paid for it, the former was justified by law in refusing to deliver the hay, his vendee having absconded, thus putting him in imminent danger of losing the price. It is equally clear that, as relates to third persons, the property of the thing sold does not pass to the vendee, till after delivery. Wood could transfer to the plaintiffs only his right of requiring the delivery of the hay on paying the price, or on giving security to pay it at the time agreed on. Civ. Code, arts. 2463, 2464, 2433. 9 Mart. 592. But it is urged that the sale was made by Wood to the plaintiffs, in the presence of the defendant, who, before the sale, represented the hay as Wood's property, and did not inform them that he had any lien or claim upon it. If this circumstance were alone considered, it would probably be conclusive against the defendant; for no man should be permitted to stand by and see his property sold, and, after a *bona fide* purchaser has paid his money on the faith of his declarations or apparent acquiescence, set up his title in opposition to such purchaser. But, in this case, the testimony shows, that the plaintiffs knew perfectly well the extent of Wood's right to the property, and were not misled by the defendant's acknowledgment of such right. It is shown that, on the defendant's refusal to continue putting out the hay, they advanced to Wood \$700, for the purpose of paying the defendant, well knowing that he could withhold the balance of the hay, which he had begun to deliver to them at the request of Wood. The hay being yet in the possession of the vendor of their vendor, they did an imprudent act in advancing to the latter a greater proportion of the price than was then due. In doing so they trusted Wood, and must abide the consequences of his dishonesty, in the same manner as the defendant must lose the value of the hay he

delivered, over and above the sum he received from his vendee. As to the residue of the hay which remained in his possession, he was entitled to retain it until it was paid for, and Wood had acquired no absolute right to it which he could transfer to the plaintiffs.

LEVI H. GALE v. J. W. THOMPSON.

APPEAL from the District Court of the First District, *Buchanan, J.*

Carter, for the appellant.

Benjamin, for the defendant.

BULLARD, J. The plaintiff is appellant from a judgment rejecting his claim for damages against the defendant, captain of the ship Bowditch, for the non-performance of his contract to pay the plaintiff commissions for procuring a full freight for his vessel to Havre. The plaintiff, who is a ship broker, alleges that he offered to comply with the contract on his part, but that it was violated on the part of the defendant. It is not disputed that the full freight would have amounted to upwards of twenty thousand dollars; and the commission was five per cent.

We concur in opinion with the Judge of the District Court, that the commissions were promised upon condition, that the plaintiff should furnish guarantees of shippers, for a full freight at two and a half cents per pound for cotton. The only question, therefore, is, whether such guarantee was furnished. The document which it is contended amounts to a guarantee for the balance of the freight not previously engaged, is signed by the plaintiff himself. It is in the following words: "I hereby agree to fill up the ship Bowditch, all over and above one thousand bales at two cents and one half a cent freight, for Havre." On the back of this paper is the signature of F. Ganahl & Co. The latter refused to give any explanation as to their intention when they endorsed the paper. Admitting that the holder of such an instrument, would have a right to fill up the blank with any promise not inconsistent with

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that expressed on the face of it, yet it would amount, in this case, to nothing more than a securityship, or an engagement to guaranty the contract made by the plaintiff. But it appears to have been the guarantee of shippers which was required, and not mere security that the plaintiff would comply with his contract to procure a freight. The instrument does not set forth any new contract on the part of Gale. It merely expresses in writing his previous promise to procure a full freight. It is not pretended that he had any cotton of his own to ship, nor did Ganahl & Co. engage to ship the balance of the cotton over and above one thousand bales. But even supposing this was substantially the guarantee required, and that the offer of a check for \$3000 to complete the full, guarantee, was, *pro tanto*, a compliance with the condition, yet it does not appear to amount to a full guarantee for the entire cargo, because there was no positive agreement on the part of Chate-nat to ship five hundred bales, which would have completed the cargo. The number of bales he was to furnish was not definite.

Upon the whole, we are not satisfied that the court erred.

Judgment affirmed.

BENJAMIN HARROD and another v. ELIHU WOODRUFF and another.

Art. 3499 of the Civil Code does not apply to shipwrights who undertake to build or repair ships or other vessels, whether under a contract for a stipulated sum, or otherwise. It applies only to the claims of workmen or laborers for their daily or monthly wages, and to the sellers of materials for the price thereof, against the person with whom they contract directly, whether the owner or undertaker.

APPEAL from the District Court of the First District, *Buchanan, J.*

MORPHY, J. This is an action to recover a balance due on an account for work and labor done, and materials furnished in repairing the steam boat Caspian, belonging to the defendants. After a general denial of indebtedness, the owners of the Caspian

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allege, that the plaintiffs, who are shipwrights, undertook and agreed to repair their boat for \$1600, and they annex to their answer the contract entered into between them to that effect. They aver that the plaintiffs, in making the repairs, acted so negligently, and provided such defective ways, that the boat fell to the ground, and was thereby so much strained and injured, that they had to pay the plaintiffs to repair her upwards of \$4000, which the petition of the latter admits that they received. They further plead the prescriptions of one and three years, and, by way of reconviction, pray for damages. The plea of prescription was sustained below; whereupon, the plaintiffs appealed.

The contract referred to in the answer, after specifying the main repairs which were to be made for \$1600, provides that any other work shall be extra, and charged at customary prices. The judge below was of opinion that, as it appeared from the account of the plaintiffs, that the stipulated sum had long since been paid, the balance of the claim yet unpaid, which was on a bill of particulars for supplies of materials and labor, fell within the prescription of one year, provided by article 3499 of the Civil Code.

In deciding the question of prescription, to which we propose to confine our attention, it is unnecessary to determine whether all the charges in the account are covered by the contract, or whether they have partly been rendered necessary by the alleged negligence of the shipwrights, and the insufficiency of the preparations made to haul up and block the boat for the purpose of the intended repairs. The article of the Code relied on does not, in our opinion, apply to shipwrights who undertake to build or repair ships or other vessels, whether under a contract for a stipulated sum, or on a *quantum meruit*. It contemplates, we think, only the claims of the workmen and laborers for their daily or monthly wages, and those of the sellers of raw materials for the price thereof, against the persons with whom they contract directly, whether it be the owner himself or the undertaker; but those who, like the plaintiffs, undertake to build or repair a vessel, are neither workmen or laborers claiming their wages, nor are they the furnishers of wood or other materials claiming the price thereof. In the execution of their undertakings, they employ mecha-

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tics of different trades, and procure the wood, iron, and other necessary articles ; and their remuneration is compounded of the wages they pay to these people, the disbursements they make in purchasing every thing necessary, the use of their yards and ways, and their personal trouble and care in superintending the whole work. Their claim, although presented in the shape of a bill of particulars, where there has been no sum agreed on for the job, is one entire claim for the construction or repairs they have undertaken ; and no particular items, either of labor done or materials furnished, can be taken or singled out of their account, and subjected to the short prescription of one year. The decision now made accords with our former adjudications on this article of the Code. 6 La. 393. 10 La. 230. 19 La. 413. The judgment of the inferior court being based entirely on the plea of prescription, and the matters of fact involved in this controversy not having been passed upon below, we have thought it best to send the case back for a trial on its merits.

It is, therefore, ordered, that the judgment of the District Court be reversed, and the plea of prescription overruled ; and it is further ordered, that this case be remanded for further proceedings according to law. The costs of this appeal to be borne by the defendants and appellees.

I. W. Smith, for the appellants.

Preston, for the defendants.

ROBERT ABBOTT v. F. GANAHL and another.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Carter*, for the plaintiff.

L. C. Duncan, for the appellants.

BULLARD, J. The plaintiff, who is the lessee of a cotton press, sues to recover of the defendants \$365 25, for drayage, labor, and rope and bagging. The defendants, after denying the justice of the claim, demand in reconvention about six hundred dollars, for damages sustained by their cotton through the fault of the plain-

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tiff. There was a judgment for a part of the plaintiff's demand, and the defendants have appealed.

The case turns wholly upon questions of fact. The damage sustained was occasioned by a part of the cotton being left exposed to the weather. This appears to have been done with the consent of the defendants, although the original agreement was that it should be under shelter. The District Court rejected the claim of the plaintiff for storage of such parts of the cotton as was thus left exposed, and gave judgment in his favor for the balance. We are not satisfied that it is our duty to reverse the judgment.

Judgment affirmed.

JACOB SCHOLLINGER CONKLIN v. GEORGE G. KIRK and another.

APPEAL from the City Court of New Orleans, Cooley, J.

This case was submitted, without argument, by *Conklin, pro se*, and *Haynes*, for the appellant.

SIMON, J. An execution, issued at the suit of the defendant Kirk, against John Kellar, was levied on the 13th of September, 1841, by the marshal of the City Court, on certain household effects and furniture, as the property of Kellar, in a house then rented and occupied by the plaintiff, but which had been previously occupied by Kellar.

Plaintiff obtained an injunction to stop the sale of the property seized, on the ground that it belonged to him at the time of the seizure, he having purchased it, or a part thereof, from John Kellar, on the 8th of August preceding, for a good and valuable consideration. He prayed that the property might be adjudged to belong to him, and for judgment against the marshal, and Kirk, for the sum of two hundred dollars damages.

The marshal joined issue by pleading a general denial, and averring that he was in good faith when he made the seizure, and that previous to levying the execution, he took an indemnity bond from Kirk, with certain persons as his securities, whom he prayed might be cited in warranty.

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The defendant Kirk, also pleaded the general issue, and further averred that, if any sale was made of the property seized, by Kellar to the plaintiff, it was fraudulent.

After a full investigation of the facts adduced by both parties in support of their respective pretensions, the inferior judge came to the conclusion that the property in dispute really belonged to the plaintiff, and made the injunction obtained by him perpetual. From this judgment, the defendant Kirk has appealed.*

The evidence shows that on the 8th of August, 1841, Kellar sold to the plaintiff, by an act under private signature, certain articles of household furniture which are comprised among those seized by the marshal. The consideration is therein stated to consist in the amount of two drafts which had been accepted but not paid, and which had been given in settlement for professional services; and in another sum due for professional services, rendered by the plaintiff, who is an attorney at law, to John Kellar, his client, at different times and in divers law suits. It appears that the plaintiff took immediate possession of the articles sold; that on the day of the purchase, he rented the house in which they were left by Kellar, who was the former tenant; that plaintiff brought there other effects and furniture, which he had at his former residence; that he continued to live there, and remained in possession of all the household effects and furniture, subsequently seized by the marshal; and that when the execution was levied and the inventory made, the marshal found the plaintiff in possession of the house. The deputy marshal, who made the seizure, being examined as a witness, states that, among other things, he saw a table and *armoire*, with books on the table and in the *armoire*, marked *Conklin*.

The defendant has also attempted to show that Kellar was at the time of the sale in insolvent circumstances to the knowledge of the plaintiff, and that the sale under consideration should be revoked and set aside, as giving an undue preference to the plaintiff over the other creditors of Kellar, and as being a fraud on the said creditors. This point is not presented at all by the pleadings, and perhaps should have been disregarded below; but even supposing that it could have been taken into consideration, we think, with

* No damages were allowed.

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the judge *a quo*, that the defendant has entirely failed to make out Kellar's insolvency, or to prove any of the facts necessary to be adduced in support of the revocatory action by which he tried to establish his defence. Kellar was not insolvent. Nothing shows the amount of his debts. On the contrary, his solvency appears to have been established by all the witnesses, but one, who was examined at the request of the defendant, and whose testimony the lower judge found so inconsistent and contradictory, that he thought it to be entitled to very little weight. This evidence, we also think, was very properly disregarded.

On the whole, we are of opinion that the judgment appealed from is correct. The date of the sale is sufficiently established by all the surrounding circumstances; and as this case presents merely a question of fact for our solution, were it left doubtful, we should not consider ourselves authorized to disturb a judgment which was rendered after the case had undergone the fullest and most minute investigation. We are satisfied, however, that the facts support the plaintiff's demand, and that the defendant has failed to make out his defence.

Judgment affirmed.

THOMAS B. HARRISON and Wife v. D. F. WAYMOUTH and Wife.

A bill of exceptions is only necessary, where something is to be brought to the knowledge of the appellate court, which would not otherwise appear in the record.

In an affidavit for a continuance, on the ground of the absence of a witness, a statement "that the witness has left the city for a few days," is equivalent to an allegation that he is expected to return at the expiration of that period, and will be sufficient.

Where, on an application for a continuance, defendant swears, that he expects to prove by a witness, who is absent, "that plaintiffs had caused great damage to him by their illegal conduct, that he is not indebted to them, and that he cannot safely go to trial without his testimony," the circumstance of his having other witnesses to the same facts, ought not to deprive him of the benefit of a continuance; for the absent witness might have the means of speaking more positively than the others.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

MARTIN, J. The defendants and appellants complain that a continuance was incorrectly refused to them. They claimed it on

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an affidavit, that they could not safely proceed to trial without the testimony of Lawrence Finnick, by which they expected to prove the allegations in their answer; that they left the name of said Finnick, to be summoned as a witness, and his domicil, according to the rules of the court relating to the summoning of witnesses; that the subpoena was left at the witness' domicil on the 16th instant, when they heard, for the first time, that he had left the city for a few days; and that the affidavit is not made for delay, &c. The plaintiffs' counsel contend that the defendants cannot urge this matter in this court, because no bill of exceptions was taken to the refusal of the continuance below. We are ignorant of any necessity for a bill of exceptions in a case like this. Such a bill is needed only in those cases, where something is to be brought to the knowledge of this court, which would not otherwise appear.

The judgment informs us that the affidavit was insufficient, because it is not shown that the witness was expected to return, and there were several other witnesses, who lived in the house, to the same point to which his testimony was wanted. The judge, in our opinion, erred. Had the defendants sworn that they were informed that the witness was expected to return within a week or a month, this would have sufficed. They swear that they were informed that he had left the city, for a few days. This certainly means that he was expected to return, within that time. The circumstance of the defendants' having had other witnesses to the fact which they intended to prove by the absent one, ought not to have prevented the granting of the continuance, for it was not known, when the continuance was refused; and even had it been known, it would have been insufficient, for the absent witness might have the means of speaking more positively than those who attended; and this was impliedly attested in the affidavit, which states that, without the testimony of this witness, the defendants can not safely proceed to trial.

It is, therefore, ordered, that the judgment be reversed, and the case remanded for a new trial; the plaintiffs and appellees paying the costs of the appeal.

Micou, for the plaintiffs.

Carter, for the appellants.

Succession of Felix De Armas—Le Carpentier, Executor, Appellant.

SUCCESSION OF FELIX DE ARMAS—JOSEPH LE CARPENTIER,
Executor, Appellant.

Where a mortgage recites, that the mortgagor wishes to place the mortgagee "*à l'abri de ses avances d'argent, et des effets des endossements que celui-ci voudra bien lui fournir,*" it will be considered as having been given to secure past, as well as future advances.

Acts granting mortgages will, in cases of doubt, be strictly construed.

APPEAL from the Court of Probates of New Orleans, *Bermudez, J.*

Benjamin, for the appellant.

C. G. De Armas, contra.

SIMON, J. Le Carpentier is appellant from a judgment rendered against him, in his capacity of dative testamentary executor of the late Felix De Armas, ordering him to pay to the petitioner the sum of four thousand three hundred and five dollars and seventy-one cents, with interest, as a mortgage creditor of the estate of the deceased, out of the proceeds of certain property described in the judgment.

The act of mortgage, on which the petitioner's claim is founded, appears to have been passed for the purpose of securing certain advances made by the petitioner, and to protect him against the effect of endorsements which he was to furnish to the deceased, the whole not exceeding twenty-five thousand dollars. The object of the passing of the act, is therein expressed in the following words: "*Lequel (Felix De Armas) voulant mettre M. François Alpuenté à l'abri de ses avances d'argent, et des effets des endossements que celui-ci voudra bien lui fournir, jusqu'à concurrence d'une somme n'excédant pas celle de vingt cinq mille piastres,*" &c. It is contended, by the appellant, that the mortgage was merely given to secure *future* and *prospective* advances, and not to secure advances which had been *previously* made.

We cannot accede to this proposition. It seems to us that the expression used by the parties, "*à l'abri de ses avances d'argent,*" indicates satisfactorily that the advances alluded to had already been made, and that it was only necessary, for the purpose of ascertaining the amount thereof, to refer to the receipts or vouchers by

Succession of Felix De Armas—Le Carpentier, Executor, Appellant.

which the amount could be liquidated and established. Had the security been intended only to secure advances to be made *in futuro*, the terms used would perhaps have been, "*à l'abri des avances d'argent, et des endossements que celui-ci voudra bien lui fournir*," and not "*de ses avances*." Indeed, the latter expression shows that at the time of the contract, the petitioner was a creditor of the deceased for certain advances; and, we think, that, although the rule is, that acts granting mortgages, in cases of doubt, should always be strictly construed, the terms of the contract under consideration are such as to satisfy us, without any relaxation from the rule, that the intention of the parties was clearly to secure, not only advances which had been already made, but also endorsements which were to be subsequently given or furnished.

It has been urged, however, that the rights of the petitioner, as a mortgage creditor of the succession, cannot be decided in this suit; and that the probate judge should have merely liquidated the account, and established the balance for which the petitioner was to be placed on said account, leaving his rank to be settled on the filing of the account. This would have been perhaps the most proper and legal course originally; but it has been asserted in argument and not denied, nay, we have been referred to a record of this court, to show, that there was a suit pending before the inferior court in which the petitioner had filed an opposition to the appellant's account as executor, grounded on the judgment appealed from, and that the judgment to be rendered in the present suit, will have the effect of settling definitely the controversy resulting from the opposition yet undetermined. Under such circumstances, we see no reason why we should not pronounce at once upon the legal rights of the petitioner, and not subject the parties to further and useless costs and litigation.

The liquidation of the amount due to the petitioner has not been controverted, and the judgment of the lower court appears to us to have been correctly rendered.

Judgment affirmed.

JOHN FERGUSON and another v. J. P. WHIPPLE.

The admission of irrelevant testimony is no ground for remanding a case for a new trial, where its exclusion would not probably vary the result.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Emerson*, for the plaintiffs.

Winthrop, for the appellant.

MARTIN, J. The certificate of the clerk does not enable us to review the judgment, that officer attesting only that the transcript contains all the proceedings and all the documents filed in the cause. No testimony appears to have been taken down, and the case is only before us on a bill of exceptions, taken by the defendant and appellant, to the offer, by the plaintiffs, of witnesses to prove the personal habits of the defendant, and to show that he was becoming or was already addicted to intemperance, on the ground that such testimony was totally irrelevant, and had nothing to do with the question before the court. If the testimony was *totally irrelevant, and had nothing to do with the question before the court*, it ought not to have been admitted, because its admission could have no other effect than to consume uselessly the time of the lower court. It could not have injured the defendant's case. But this loss of time would not certainly be remedied by reversing the judgment, and remanding the case for a new trial. The absence of this objectionable testimony would not probably produce a different result.

Judgment affirmed.

MARIE JOSEPH BEAULIEU and others v. FREDERICK FURST and others.

A party against whom an order of seizure and sale had been issued, presented a petition alleging that the mortgage and notes were obtained by fraud, and that the mortgage was illegally executed, and praying for an injunction, for a judgment rescinding the act, for damages against the mortgagee and a third person alleged to have been concerned in the fraud, and for a trial by jury. The mortgagee answered, praying that the injunction might be dissolved, the demand rejected, and for a judgment in his favor for the amount of his debt. *Held*, that the causes of opposition not being confined to those enumerated in art. 739 of the Code of Practice, and the proceedings having been changed from the *via executiva* to the *via ordinaria*, the mortgagee must be considered as a defendant, in the proceedings to obtain the injunction; and that the other party, like other plaintiffs, was entitled to open and close the argument.

APPEAL from the District Court of the First District, *Buchanan, J.*

GARLAND, J. In April, 1837, Furst sold to the Beaulieus a house and lot on the Bayou road, for \$13,400, payable in twelve and eighteen months. They executed their notes for the price, and to secure their payment, gave an endorser, and a mortgage on the property sold, and on a tract of land on the Metairie road, in the parish of Jefferson, on which they resided. When the first payment became due, Furst presented his petition praying for an order of seizure and sale of the property on the Bayou road alone. The Beaulieus filed an opposition to this proceeding, alleging various grounds of nullity, either relative or positive, in the act of sale and mortgage, to which Furst filed an answer. This opposition was dismissed by the opponents. The property was sold by the sheriff, and brought a little more than the amount of the first note. When the second note became due, Furst presented what he called his supplemental petition, although the first order of seizure had been previously executed and the amount for which it issued fully satisfied, alleging that the second note had become due, and remained unpaid, and asking that such order and relief as was needful might be granted. The judge made no order on this petition, but the Beaulieus, by their counsel, accepted service of it, and filed an answer, reiterating all their objections to the first order of

Beaulieu and others v. Furst and others.

seizure. Upon this the counsel of Furst discontinued his proceedings; but on the same day filed, by the leave of the court, another supplemental petition, setting forth, more specifically the previous proceedings under the first order of seizure and sale, the maturity of the second note, and the existence of a mortgage on the land on the Matairie road; and concluded by a prayer for a second order of seizure and sale, which was granted by the judge upon the filing of the second note.

This last writ was about being executed by the sheriff, when the Beaulieus presented a regular petition to the District Court, stating its existence, the attempts to execute it, and, after several allegations as to want of notice and demand of payment at the proper place, &c., they allege that the act of mortgage and notes were obtained by fraud, and other unlawful means, practiced by the agents of Furst, with his connivance. They aver that the act is null and void, because it was not executed before a notary public; that it was signed in the parish of Jefferson, where they reside, and where the notary, before whom it purports to have been executed, has no authority; that he was not present at the time; that all the persons who subscribed the act as witnesses did not see them sign it, and that but one of them was present. The petition then proceeds to state in what manner the alleged fraud was practiced; and concludes by a prayer for an injunction, for the setting aside of the order of seizure and sale, for ten thousand dollars damages, for the rescinding and cancelling of the act, and for a trial by jury.

A person named Favre Hazeur, who was alleged to be a principal agent in the fraud, was also made a party, and judgment for damages asked against him. Furst and Hazeur answered this petition and the interrogatories at great length, denying any fraud or collusion between them. The former denied most positively that the latter was his agent, giving a full detail of all the circumstances of the transaction. Furst concludes his answer by praying for a dissolution of the injunction, that the demand of the plaintiffs may be rejected, and that he may have a judgment in his favor, and for general relief.

The District Judge at first ordered the case to be put on the court docket, and proceeded to try it summarily; but after some in-

vestigation, he concluded that it was a case which properly belonged to a jury, and ordered it to be so tried. Four juries were unable to agree on a verdict, but the fifth found a verdict in favor of Furst, upon which a judgment was entered ; and the Beaulieus have appealed.

Upon the trial several bills of exception were taken, to which our attention has been called.

The first, is to the opinion of the judge permitting the counsel for Furst to open and close the argument to the jury. They insisted, as Furst was the plaintiff in the application for the order of seizure and sale, that he continued to be so, and that the petition for an injunction should only be considered as an answer or opposition to their demand, and the answer of Furst to it, only as a replication, or answer to a demand in reconvention. The judge below so viewed the proceedings, and, by considering the Beaulieus as opponents only, decided they did not come within the meaning of the articles 476, 477, 485, of the Code of Practice, and the well settled rule, established by this court, that the plaintiff has the right of opening and closing the argument. If the causes of opposition were confined to those mentioned in article 739 of the Code of Practice, and the proceedings had not been changed from the *via executiva* to the *via ordinaria*, it is possible the judge would have been correct. But in this case, the causes for the injunction go to other matters than those stated in that article. New issues have been raised, in which the Beaulieus hold the affirmative. To these Furst has responded, and, in his answer, he asks for a judgment for his debt, in the nature of a reconventional demand. If Furst confines himself to his original petition, it is clear that he must fail, as it is shown beyond all doubt that the act is not one on which an order of seizure and sale can be issued. It is proved beyond all question that the act was signed in the parish of Jefferson, where the Beaulieus reside, and that the notary, who resides in New Orleans, was not present at all. The act purports to have been executed in the presence of three witnesses, and they signed it ; but the evidence clearly establishes that two of them, Wolmar Bon and Quemper, were not present, and never saw the parties sign at all. The former testifies to the fact. Emmerlung, a witness named in the act as being present, says that no one was present

but himself and Le Carpentier. He signed it after he returned to the city. Le Carpentier says he saw it signed, but his name is not in the copy on which the order of seizure and sale was issued. The act is shown not to have been executed in the presence of a notary and two witnesses, and does not import a confession of judgment. No order of seizure can, therefore, be issued on it; and Furst's only chance to prevent being turned out of court, is to hold on to his answer to the petition for an injunction, in which proceeding he is the defendant. The idea that Furst continued to be the plaintiff after the injunction, seems not to have suggested itself until the argument before the jury. In his answer he styles himself the defendant, and the Beaulieus the plaintiffs. Throughout all the pleadings and trial, up to the argument, he and they are invariably so called; and we think he cannot at pleasure shake off his acknowledged capacity, and assume that of his adversary. The plaintiff's counsel in all cases, is entitled to the opening and closing argument; and being satisfied that the Beaulieus are such, we think the judge erred in permitting the counsel for Furst to open and conclude the argument to the jury. 5 Mart. N. S. 75.

The second bill of exceptions, is to the opinion of the judge refusing to permit Rillieux to relate all that the plaintiffs had said to him, at the time they told him "the property was seized, but did not explain how, or the circumstances," on the ground that, as the other party had called for a part of what was said, they had a right to know all that passed. We think the judge did not err. The principle of law asserted is correct; but so far as we are able to understand the objection, and what the witness stated, it does not appear that there was any other conversation relevant to this transaction.

The third bill is to the refusal of the judge to permit Favre Hazeur, the broker, to testify to all the facts of the case as they occurred. Furst objected, on the ground that he was the endorser of the note sued on, and interested in the case. We think the judge did not err; and the objection that it was too late after the witness was sworn in chief cannot avail the plaintiffs, as the record shows that the testimony of the witness was not intended in the first instance to apply to Furst.

The judgment of the District Court is, therefore, reversed, and

Succession of Antoine Carraby—Etienne Carraby, Appellant.

the cause remanded for a new trial, with directions to the District Judge to permit the counsel for the Beaulieus, the plaintiffs, to open and close the argument before the jury, and otherwise to proceed according to law; the appellee paying the costs of the appeal.

J. W. Smith, for the appellants.

L. C. Duncan, contra.

SUCCESSION OF ANTOINE CARRABY—ETIENNE CARRABY,
Appellant.

Where a stranger to a succession withholds the price of property purchased at a sale of its effects, an action for the amount can be brought only before a court of ordinary jurisdiction. *Aliter*, where a legatee and universal heir seeks to avail himself of the privilege allowed by art. 1285 of the Civil Code, of retaining the price of property so adjudicated until his share shall be fixed by a partition. The rights of a co-heir, who exercises this privilege, must be settled contradictorily with the other heirs, under the direction of the Court of Probates, whose decree must fix the portion coming to each. Until this be done, the heir who purchases keeps the purchase money as a kind of deposit, subject to the decision of the Court of Probates, which must determine what he is to pay over. The court which makes such a decree, must have authority to enforce obedience to it.

Before delivering the whole estate into the hands of an universal heir, the executor has a right to require, that a sufficient sum be placed in his hands to pay the particular legacies. C. C. 1664.

APPEAL from the Court of Probates of New Orleans, *Bermudez, J.*

MORPHY, J. The facts which led to this controversy, relate to the settlement of the estate of the late Antoine Carraby. In his last will, the deceased, after bequeathing one-fourth of the nett proceeds of all his property to his natural children, declares that all the particular legacies which he makes, to the amount of \$62,000, are to be borne by, and paid out of the three remaining fourths of his succession. He institutes his brother, Etienne Carraby, the present appellant, his sole and universal heir, for any surplus of his property which may be left, after the payment of

Succession of Antoine Carraby—Etienne Carraby, Appellant.

all his just debts and the particular legacies. Among the latter was one of \$15,000 to the said E. Carraby, and one of \$10,000 to Arnaud Carraby, another brother of the deceased. This last amount, according to the will, is to be paid over to Etienne Carraby, to be by him laid out at interest, or invested in real estate, and the interest, or the rent, as the case may be, paid every month to Arnaud Carraby. The testator concludes by appointing Etienne Carraby his executor; and in case of death, absence, or inability to act from any other cause on the part of Carraby, he appoints in his place, his nephew, Philippe Guesnon. After administering for some time on the estate, Etienne Carraby resigned his trust, whereupon P. Guesnon qualified as executor, and proceeded to sell all the property belonging to the estate. At this sale, Etienne Carraby purchased property to the amount of \$44,845, in payment of which he receipted to the executor for the \$25,000 coming to him for his own particular legacy, and that of his brother, Arnaud Carraby. For the balance of the price, he gave endorsed notes, which he afterwards prevailed upon his nephew, Guesnon, to return to him before they became due. He appears to have received them back as money which might be coming to him as the universal heir of the deceased. Guesnon, throughout his administration, suffered Carraby to intermeddle with it by paying part of the debts and legacies, and by receiving funds belonging to the estate in his capacity of universal legatee. On the 20th of November, 1838, the executor, at the instance of Carraby, filed an account of his administration. From this account it appeared that, after paying the debts of the estate, the executor had made to himself and some of the legatees, partial payments, amounting to \$17,896 63, and that the universal legatee, E. Carraby, had received or retained on the purchases made by him, \$32,273 29, besides the \$25,000 receipted for as particular legacies. It further appeared, that an amount of \$12,454, in notes, had been returned by the executor as uncollected and of no value. This account was opposed by several of the legatees, and by the curator of John Gravier's estate. The former, after objecting to several items of the account, opposed its homologation mainly on the ground, that the executor had no right to pay certain legatees in preference to others, and that, as the estate appeared insuffi-

Succession of Antoine Carraby—Etienne Carraby, Appellant.

cient to pay them all, he should not have paid over the funds in his hands to Carraby, or compensated with him for the property he had bought of the estate. The curator of J. Gravier's succession urged that he had a claim of \$60,000 against the testator's estate, and had obtained thereon a judgment for upwards of \$20,000. That an appeal had been taken by the executor, in which he, the curator, had joined, praying that the judgment might be amended so as to allow him the whole amount of the claim. That the payments alleged to have been made were unauthorized, and that no legacies should be paid until his claim be finally settled and satisfied. To these several oppositions, the executor answered, averring, among other things, that, with the exception of certain payments by him made to some of the creditors and legatees, he has handed and paid over to the universal legatee, all the sums he received or collected on behalf of the estate, and that the said E. Carraby is answerable for the same, and is bound to refund said sums, as also the amount by him kept and retained on the price of the property he purchased, to enable him, the executor, to deposit the same in court, subject to a final decision on the several oppositions filed. The executor prays, in conclusion, that E. Carraby, and the several legatees by him paid, may be made parties to the proceedings, and be decreed to refund such sums as may be found to have been improperly received or retained by them. In answer to the executor's call in warranty, and to the several oppositions by the legatees, E. Carraby averred that, as universal heir of the deceased, he is entitled to a delivery of the estate, after payment of the debts and particular legacies. That he is by law authorized to retain in his hands the price of the property he bought, till the final settlement of the succession, being the universal heir to whom the executor has finally to account, and being, moreover, entitled to two legacies, amounting together to \$25,000. That in relation to the \$32,273 29, for which he is said to be accountable, he has actually paid, to the discharge of the succession, the sum of \$9,402 10, thus reducing the balance in his hands to \$22,871 19, which he has a right to keep until a final settlement of the estate, which can take place only after a final decision in the suits pending in the Supreme Court. He prays, after other averments, that the executor be or-

dered to deliver to him as universal legatee, the whole succession, including the sums prematurely paid to the legatees, reserving to the latter their right of claiming of him, E. Carraby, their respective legacies, when the decision of the suit pending against the estate shall have shown its real amount.

Under these pleadings, which have been stated only so far as was necessary to a proper understanding of the case, the parties went to trial. After passing upon the contested items of the account, the judge below ordered the several legatees, who had received any portion of their legacies, to refund the same; and condemned the universal legatee, E. Carraby, to pay to the executor, the whole amount by him received or retained, to enable the latter to liquidate and settle the estate.

Before touching the merits of this case, which can be considered only as regards E. Carraby, who alone has appealed, an exception taken to the jurisdiction of the Court of Probates must be disposed of. It is said that as the want of jurisdiction is *ratione materiæ*, and the court is one of limited powers, no consent or act of Carraby can give it jurisdiction. We cannot admit that, in a case like the present, the Court of Probates is without jurisdiction *ratione materiæ*. If the appellant were a stranger to the succession, withholding the price of property purchased by him, he would be suable therefor only in the ordinary courts; but here, in his capacity of legatee and universal heir, he seeks to avail himself of the privilege acceded to co-heirs by article 1265 of the Civil Code, of retaining the price of succession property adjudicated to them, until their share has been definitively fixed by a partition. The rights of a co-heir who exercises this privilege are to be settled contradictorily with the other heirs, under the control of the Court of Probates, whose decree must fix the portion coming to each heir. Until this be done, the co-heir who purchases keeps the purchase money as a kind of deposit, in his hands, subject to the ulterior decision of the Court of Probates, which must determine what portion of it belongs to him as a co-heir, and what portion he is bound to pay over. The court, which has made such a decree, must have jurisdiction to compel obedience to it. The record shows, moreover, that large sums of money have been received by E. Carraby, in his capacity of uni-

Succession of Antoine Carraby—Etienne Carraby, Appellant.

versal heir ; and, as such, he claims not only the right of retaining them, but also prays for a delivery of the whole estate into his hands. Before complying with this demand, the executor has surely the right of requiring that a sufficient sum be placed in his hands to pay the particular legacies. Civ. Code, art. 1664. Of these matters and issues, the Court of Probates is certainly not without jurisdiction, *ratione materiæ*.

Since the rendition of the judgment below, both Guesnon and Carraby have failed, and the dative testamentary executor, appointed in lieu of the former, and the syndics of the creditors of the latter, have been made parties to this appeal. A more material change has also taken place in the state of the facts, upon which the judge below had to pronounce, which is that the only outstanding claim against the deceased, to wit, that of the estate of John Gravier, no longer exists. This fact has been asserted at the bar and not denied. It is moreover within our own knowledge, as it results from a decision of this court in the case of *Gravier's Curator v. Carraby's Executor*. 17 La. 118. By reason of this circumstance, which limits the distribution of the funds of the estate among the heirs and legatees under the will, we have been earnestly requested to determine at once the sum which the appellant is bound to pay back to the executor, and to amend the judgment accordingly, instead of remanding the case for adjustment below. It has been suggested that, under the peculiar situation of the parties, and in consequence of the judgment of the Probate Court having become final, as to all of them, except Carraby, who alone has appealed, a reversal of the judgment as to him might frustrate the ends of justice, by depriving the appellee of the judicial mortgage on his estate, when it is manifest that he owes and is bound to refund a large portion of the sum he has been decreed to pay. The record enables us to comply with the request of the appellee's counsel, and we deem it our duty, under the circumstances of this case, to do so. Code of Pract. art. 905.

It is clear that the appellant should not be compelled to pay over to the executor all the sums by him received or retained, and then await a settlement of the estate to receive back the portion

 Succession of Antoine Carraby—Etienne Carraby, Appellant.

which may be coming to him. Independent of article 1265 of the Civil Code which he invokes, we have uniformly held, that no one should be made to pay the whole amount of a sum which, when paid, he will be entitled to receive back in whole or in part. 8 La. 301. 1 Robinson, 535. In order to determine the amount to be paid by the universal legatee out of the sums he detains, we must ascertain the situation of the estate in relation to the legacies to be paid under the will. From the record, it is as follows, to wit:

Amount of the estate as per executor's account,	\$97,033 58
Notes returned as of no value,	12,454 00

 \$84,579 58

The debts paid amount to	9,409 55
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 \$75,170 03

Leaving, for nett proceeds,	\$75,170 03
Of which one-quarter, under the will, goes to the natural children of the deceased,	18,792 50

Thus leaving for the remaining three-quarters,	\$56,377 53
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This sum, being insufficient to pay the particular legacies, the universal legatee can only retain on his particular legacy of \$25,000, such proportion of it as would be coming to him, on a *pro ratu* distribution of the remaining three-quarters of the estate among all the legatees.

The proportion would be	\$22,732 87
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He is, moreover, entitled to retain, for so much paid by him to the legatees out of funds in his hands,	6,902 10
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Making the amount to be retained,	\$29,634 97
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The record shows that, deducting the debts of the succession proved to have been paid by him, Carraby yet detains a sum of	\$57,273 10
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From which deducting the amount he is authorized to retain,	29,634 97
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He has to refund	27,638 13
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The State v. The Judge of the Court of Probates of St. Tammany.

If to this sum be added the aggregate amount of legacies paid by both Carraby and Guesnon, to wit,

24,798 73

We find \$52,436 86

A sum sufficient to pay the natural children their one-quarter, \$18,792 50

And the *pro rata* amount of the other particular legacies, to wit, 33,644 36 52,436 86

Thus showing that \$27,638 13 is the amount which the appellant has to reimburse the executor, to enable the latter to settle and liquidate the succession.

It is therefore ordered, that the judgment of the Court of Probates be so amended, that the executor of the estate of the late Antoine Carraby recover of the syndics of Etienne Carraby's creditors, only a sum of \$27,638 13, instead of \$62,303 49, which he is decreed to pay by the judgment appealed from. The costs of this appeal to be borne by the appellee.

Roselius, for the appellant.

Hoa, contra.

THE STATE V. THE JUDGE OF THE COURT OF PROBATES OF
ST. TAMMANY.

A second *f. fa.* cannot be issued on a judgment, until the first is returned.

APPLICATION for a mandamus to the Judge of the Court of Probates of St. Tammany, *Briggs*, J.

A. Hennen, for the applicant.

Penn, contra.

SIMON, J. An application for a mandamus to the Judge of the Court of Probates of the parish of St. Tammany, has been made by *Brumfield*, with a view to compel him to issue an execution, to enforce the payment of a judgment heretofore obtained by *Brumfield* against *Ann Mortee*, as administratrix of *Peter Mortee's* estate.

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The judge, in his answer, states, that on the 5th of November, 1841, he issued an *alias fi. fa.* in the above suit, upon the written order of the plaintiff's counsel. That said execution was enjoined by Thomas J. Mortee, syndic of Ann Mortee, by order of the Court of Probates of the parish of St. Tammany, on the 6th of December, 1841. That the injunction has never been definitively disposed of, being now pending before the said Court of Probates.

It does not appear that the execution alluded to by the judge in his answer, was ever returned by the sheriff, and we must presume that it is yet in his hands, as being only suspended by the injunction. Code of Prac. art. 700. In such a case, it is clear that two executions cannot issue at the same time on one judgment, or issue and be placed in the hands of the sheriff to be acted upon successively (2 La. 66); and that a second writ of *fi. fa.* cannot be issued until the first is returned. 3 Mart. N. S. 391.

But even supposing the first execution to have been returned after being stayed by the injunction, this circumstance would not in any manner assist the applicant. The effect of the injunction is to prohibit, or rather to suspend the seizure and sale of the defendant's property, until otherwise decided by the court. If the seizure has already been made or levied, the sheriff cannot proceed to the sale of the property. He must wait until the injunction is disposed of. In this case, what would be the use of ordering a new execution to issue, if, when put into the hands of the sheriff, it cannot be acted upon? It seems to us that the present application has for its object a direct violation of the injunction; and we are not prepared to say that it should not be respected, however injurious it may be to the party enjoined.

Rule discharged.

**ALEXANDER HIVERT v. ELIZABETH ROSE JEAN PIERRE FIRMIN
LACAZE.**

Proof of an offer by the vendor to annul the sale of a slave, on the payment of a certain sum, will exonerate the plaintiff, in a redhibitory action, from the necessity of proving a tender of the slave. The tender would have been useless, without the payment of the sum demanded.

Where the record does not show whether a slave sold was delivered to the vendee at the time of the adjudication, or after the execution of the notarial act, it will be presumed that the vendor retained possession until the act of sale was passed. C. C. 2588.

Concealment by the vendor of a slave, of the fact that the intellect of the slave was not sound, is a fraud upon the purchaser, and will annul the sale. And so, though the sale were made, in the absence of the owner, by an agent aware of the defect.

Where the defendant, in a redhibitory action for the price of a slave, pleads a general denial, and specially denies that he was aware of the alleged unsoundness, he cannot set up in his defence that the alleged defect was one which the buyer might have discovered by simple inspection. Such an exception should have been pleaded, specially, to put the plaintiff on his guard, and afford him an opportunity of disproving the fact.

One who relies on a peremptory exception, founded in law, must plead it specially.

APPEAL from the District Court of the First District, *Buchanan, J.*

Bodin, for the plaintiff, cited the case of *Rouzel v. McFarland*, 8 Mart. 704.

J. F. Pepin, for the appellant. The plaintiff cannot recover. The defect alleged to have existed, is one that must have been discovered by simple inspection, and is, consequently, not a redhibitory vice. Civ. Code, art. 2497. *Briant v. Marsh*, 19 La. 391. Moreover, no tender has been proved. *Barrett v. Bullard*, 19 La. 281.

SIMON, J. This is a redhibitory action. The petition states that, on the 8th of August, 1838, the plaintiff purchased at public sale a certain slave named Betsey. That the sale was made at the request of the defendant, through his brother and agent, subject to be ratified by the defendant, who was then absent, within four months from the date of the sale. That the slave was fully guaranteed against the vices and maladies prescribed by law, and that the price paid was four hundred and seventy dollars. The plaintiff further alleges, that on the very day the slave was delivered

to him, she showed the most decided proof of madness or idiocy. That the disease existed long previous to the sale, to the knowledge of the agent, who concealed the defect from the purchaser; and that the delivery of the slave was only made after the plaintiff had paid the price thereof. He prays that the sale may be cancelled, as having been made in fraud on the part of the vendor, and that the expenses incurred for keeping and taking care of the slave, to the amount of three hundred dollars, may be awarded to him, &c.

The defendant joined issue by first pleading a general denial of the allegations contained in the petition, admitting the sale made by his agent, but specially pleading that he never knew the slave to be mad. He further pleaded the want of amicable demand.

The inferior judge was of opinion that the action was well founded, and rendered judgment in favor of the plaintiff, allowing him also the reimbursement of the jail fees, and other charges for keeping and taking care of the slave during the pendency of the suit, without liquidating them; from which judgment, the defendant has appealed.

We agree with the judge *a quo*, that the offer, made by the defendant's agent to the plaintiff, to annul the sale if he would give one hundred dollars, as the person who had purchased the slave before the plaintiff bought her, had done, which fact is shown by the testimony of Romain Moret, is sufficient to exonerate the plaintiff from the necessity of tendering the slave, as the tender would have been useless, without paying the sum of \$100. This offer is shown to have been made in a conversation which took place between the plaintiff and the defendant's brother and agent, in which the plaintiff complained that the slave was not such as she was guaranteed to be, and desired Lacaze to annul the sale. This was refused, on the ground that the slave was sound; but accepted, provided \$100 were paid.

On the merits, the evidence shows, that on the 8th of August, 1838, the plaintiff purchased at public auction a young negro-woman named Betsey, for the price of \$470; and that, on the 9th, a notarial act of sale of the slave was executed. The record does not inform us whether the slave was delivered to the vendee at

Hivert v. Lacaze.

the time of the adjudication, or after the passing of the notarial act; and we must, therefore, presume that the vendor retained the possession of the slave until the act was passed. Civ. Code, 2588. On the 12th and 13th, she was examined by two physicians, who recognized her as being the same slave that they examined on the 23d of June preceding, at the request of another individual, and declared that they were then, and are still, of opinion that she is, and for some time has been in a condition of mental imbecility. One of them states in his certificate, that the state of imbecility in which he saw the slave *a month previous*, has undergone no change—*n'a fait aucun progrès vers le mieux*. They also certify that she had a scar on her forehead, and that, struck with the strange expression of her countenance, (*habitude extérieure*), and the incoherence of her answers, their attention was called to her intellectual faculties, from which examination they ascertained that she was, and is yet, totally unfit to perform any act which may require a combination of the simplest ideas.

We think the existence of the defect complained of, and the charge of fraud alleged in the petition, are sufficiently established by the evidence. It is clear that, at the time of the sale, the vendor himself, or his agent, knew that the slave's intellect was not sound, and that the defect would subsequently be discovered by the purchaser. It was his duty to declare it, and his concealing the malady with which he knew the slave to be afflicted, was a fraud practiced upon the plaintiff, which, of itself, is a radical vice in the contract, sufficient to annul it. This vendor had already benefited once from a similar act of fraud, having sold the slave to another person some time previous, and consented to take her back, on being paid one hundred dollars by the purchaser. The sale under consideration, tainted with this nullity, must, therefore, be cancelled, although executed in the absence of the owner of the slave. *Qui facit per alium, facit per se*.

It has been insisted, however, that the defect complained of was an apparent one, and such as might have been discovered by simple inspection (Civ. Code, art. 2497); and we have been referred to the case of *Briant v. Marsh*, 19 La. 39.

Were we ready to extend the doctrine therein recognized to the present case, and to give to article 2497 of our Code, the

same broad interpretation, under a state of facts and circumstances so entirely different from those presented in the case above referred to, we still think the defendant would be precluded by his pleadings from claiming the application of that article. By his answer, he merely denies generally the allegations contained in the petition, and specially his alleged knowledge of the defect. This only puts in issue the existence of the malady, and the charge of fraud, relied on by the plaintiff; and if the defendant had really intended to establish his defence on the peremptory exception pointed out by article 2497, it was his duty to plead it, in order to put the plaintiff on his guard, and afford him an opportunity of producing evidence to counteract the effect of the exception. As the pleadings stood, the plaintiff may have thought it unnecessary to prove any other facts but those required in support of his action. It is a well known rule, that he who relies on a peremptory exception founded on law, must plead it specially (Códè of Pract., arts. 345, 346); and the defendant having failed to do so, this part of his means of defence, if at all available, must be disregarded.

With regard to the expenses alleged to have been incurred by the sale, and by the keeping and taking care of the slave during the pendency of this suit, and other damages, we concur in opinion with the judge *a quo*, that, the seller knowing the defect of the slave sold, and having omitted to declare it, they ought to be allowed. Civ. Code, art. 2523. But as the amount thereof is not, and could not, perhaps, be finally liquidated by the judgment appealed from, owing to the continuation of the controversy, and to the pendency of the suit before the appellate court, we think this is properly a subject of subsequent investigation, as being a consequence of the cancelling of the sale; and that, under the particular circumstances of this case, justice requires it should be remanded, for the purpose of assessing the amount to which the plaintiff may be entitled.

It is, therefore, ordered, that the judgment of the District Court be affirmed with costs; and that this case be remanded to the lower court, for the purpose only of assessing the amount of expenses and damages due to the plaintiff, according to the legal principles recognized in the above decision.

MATTHEW SHAW v. SAMUEL W. OAKEY and others.

37	361
47	523
37	361
48	634

Where a person in New Orleans orders, by letter, goods to be shipped to him from New York, offering to pay for them at a certain period after shipment, the contract will be governed by the laws of the latter place, where the final assent necessary to the completion of the contract was given, and the order received and executed.

An account bears interest from its liquidation; and will be considered as liquidated from the time when it was rendered, if not objected to within a reasonable period.

Where in a sale of goods, a time for payment is fixed, an agreement to pay interest may be implied.

An unliquidated account bears interest from judicial demand.

A payment cannot be imputed to the reduction of the principal, where any interest is due. C. C. 2160.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Emerson*, for the plaintiff.

T. Slidell, for the appellants. The contract should be governed by the laws of this State, and the interest, if allowed, should be five per cent. Story, Conflict of Laws, 247. *Fanning and others v. Consequa*, 17 Johnson, 510.

MORPHY, J. This action is brought on two invoices of goods, shipped in New York to the defendants, who reside in this city. When the latter requested the plaintiff to forward the goods, it was stipulated that they should pay for them six months after the shipment should have been made in New York. Some partial payments having been shown on the trial, judgment was given below for the balance due on the amount of the two invoices, together with interest thereon at the rate of seven per cent per annum from the expiration of the credit agreed on. The defendants have appealed.

The only point made in this case is, that no interest should be allowed, the claim being on an unliquidated account; and that if allowed, it should not exceed five per cent per annum. Even were this contract to be regulated by the laws of Louisiana, as the appellants contend, the plaintiff would be entitled to interest from judicial demand; but we are of opinion that the laws of New York are to govern, because the final assent necessary to the formation of the contract was given by the plaintiff in New York, where he received and executed the defendants' order for the goods.

Story's Conflict of Laws, § 285. *Whiston et al. v. Stodder et al., Syndics*, 8 Mart. 133. In that State it has uniformly been held that after an account has been liquidated, it carries interest, and that an account is to be considered as liquidated after it has been rendered, if objections are not made to it. 15 Johnson, 424. It appears reasonable enough to presume the acquiescence of the debtor in an account rendered to him, if, during a reasonable time for that purpose, he does not object to its correctness. It also seems, that where in a sale of goods, a time for payment is fixed, an agreement to pay interest may be implied. 6 Cow. 193. 2 Wendell, 501. In their letters to the plaintiff, shortly after the arrival of the goods, the defendants acknowledged they had received them, with the two invoices sued on, without either then or since making any objection to the account thus rendered to them. They, moreover, fixed themselves the time of payment, at six months from the delivery of the goods on board of the ship at New York, and the time of such shipment is shown by the bill of lading. They, therefore, owe interest from the expiration of the credit given, at the rate of seven per cent per annum, which is the interest allowed in that State. Revised Statutes of N. Y. vol. 1, p. 760, 2d ed. As to the mode of computing the interest, the judge appears to have calculated interest on the principal up to the time when a payment was made, and to have added this interest to the principal and then deducted the amount paid. This appears to us to be correct, where the payments exceed the interest due. *Williams and others v. Houghtaling and others*, 3 Cowen, 87, note (a). Civ. Code, art. 2160. It was also the principle of the Roman law. *Prius in usuris, reliquum in sortem*. De Fid. et de Mand. l. 68.

Judgment affirmed.

DAVID REEVES and others v. NATHAN F. COMLY.

The subsequent return of a party, whose property had been attached on an affidavit that he had left the State with the intention of never returning, will not alone be sufficient ground for dissolving the writ, where circumstances render it probable that his original intention was not to return. The intention of returning should have been clearly proved, to entitle the defendant to a dissolution of the attachment.

APPEAL from the District Court of the First District, *Buchanan, J.* A rule was taken on the plaintiffs, to show cause why an attachment, which had been issued in this case on an affidavit that the defendant "had absconded from the State with the intention of never returning," should not be set aside, on the ground that the affidavit was false. The record of the case of *The New Orleans Canal and Banking Company v. Comly*, (1 Robinson, 231,) was the only evidence introduced on the trial of the rule. The rule having been made absolute, the plaintiffs appealed.

R. M. Carter, for the appellants.

Durant, for the defendant.

MARTIN, J The plaintiffs are appellants from a judgment sustaining the opposition of the defendant to a writ of attachment obtained by the former, on the disproof of the fact alleged, to wit, that the defendant had left the State with the intention not to return. The facts of this case are exactly the same as those in a case against the same defendant, decided in this court in January last. 1 Robinson, 231.

The first judge determined the question of law in accordance with our judgment in the former case, but he viewed the question of fact in quite a different light.

The defendant gave his actual return as evidence of his intention to return, and the court was of opinion that the record presented no fact which authorized a conclusion different from that to which it arrived. In this, in our opinion, the judge erred. The record of the case determined by us in January last, taken from the minutes of the District Court, from which the appeal was brought up, was placed before him. On the facts proved in the District Court, we said, that "the case of the defendant is that of a person charged with having, with the aid of one of the tellers

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of the Bank, actually defrauded it of a sum of upwards of sixty thousand dollars, a circumstance which, in our opinion, removes every suspicion of an intended deviation from the truth in the President of the Bank, who made the affidavit required by law. Notwithstanding this, if the defendant had made his intention to return evident, he would be entitled to relief; but the consequences he had to apprehend from the gross fraud he is charged with having committed on the Bank, rendered his intention to avoid them by flight so probable, that the mere circumstance of his return does not totally destroy the presumption. Men often do that which they once intended not to do."

It is therefore ordered, that the judgment be reversed, and the attachment reinstated; the defendant and appellee paying the costs of the appeal.

ANTOINE JONAU v. LOUIS FERRAND.

A balance due on an unliquidated account, cannot be pleaded in compensation in an action on a due bill or *bon*; nor in reconvention, when unconnected with the plaintiff's claim.

Pleas in reconvention must be set forth with the same certainty as to amounts, dates, &c., as if the party opposing them were plaintiff in a direct action.

Instead of striking out any portion of the pleadings, a more regular course is to permit the parties to go to trial, and to reject, on the objection of the opposite party, any evidence offered to sustain such portion.

Evidence, when required to be reduced to writing, must be taken down by the clerk, and should, in all cases, be read to the witness before he leaves the stand. The judge has no right, under any circumstances, to add to, or take from it, without recalling the witness.

A broker, examined as a witness to prove the market value of certain stocks, will not be compelled to disclose the names of persons to whom he has sold shares of the same stock, where there is no intimation of any intention to examine such purchasers for the purpose of contradicting him, their names being, under such circumstances, immaterial.

APPEAL from the City Court of New Orleans, Cooley, J.

This case was submitted, without argument, by *L. Janin*, for the plaintiff, and *Schmidt*, for the appellant.

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GARLAND, J. The defendant resisted a claim made upon his due bill or *bon*, for money acknowledged to have been received, by a plea in compensation and a demand in reconvention, on an allegation of long standing and unsettled accounts. These pleas were, on the motion of the plaintiff's counsel, stricken out, on which the defendant pleaded payment. There was a judgment against him, and he has appealed.

In this court the defendant's counsel complains that his original pleas were erroneously stricken out. In two cases, between the same parties, which were determined in May last, the same points were raised; and we were of opinion that the pleas of the defendant could not be sustained, because the sums pleaded in compensation were entirely unliquidated. Neither could the demand in reconvention be sustained, because the defendant's allegations were too general, and did not show that the matters upon which his claims were based, had any connection with the demand of the plaintiff. We then referred to the case of *White v. Moreno*, 17 La. 372, in which we held, that "pleas in reconvention should be set forth with the same certainty as to amounts, dates, &c., as if the party opposing them were himself plaintiff in a direct action." We are of opinion that the judge did not err, in *striking out* those pleas, as it is called; though the most legal and regular course would, perhaps, have been, to permit the parties to go to trial, and to have then rejected, on the objection of the plaintiff, any evidence the defendant might have offered. The *striking out* of a plea, which still remains in the record, and cannot be withdrawn without the consent of both parties, means, we suppose, that the judge intends to disregard it on the trial; and as, in this case, it gave the defendant an opportunity to avail himself of another ground of defence, no injury has been sustained by him, since the judge would have been right in rejecting any evidence he might have offered, in support of the plea in compensation and the demand in reconvention.

The first bill of exceptions in the series which the record exhibits, is to the opinion of the judge ordering an addition to be made to the testimony of a witness, which had been taken down by the clerk, after the witness had retired. This he did on motion of the plaintiff's counsel, although opposed by the defendant,

who insisted that it could not be done without recalling the witness. The addition was as follows : " Witness says he knows nothing more of what is contained in defendant's affidavit. Cross-examined—Says that the par value of the stock is \$50." The judge, in the bill of exceptions, states that he permitted the correction to be made, as he had a perfect recollection that the witness stated what was inserted, and the clerk had omitted to take it down. We have not the shadow of a doubt but this is true. The high character of the judge forbids the suspicion of an improper motive, and none is imputed by the counsel ; but we are of opinion that the judge erred. The law requires the evidence to be taken down by the clerk, when required by the parties. Great care should be taken to get it correctly stated, and in all cases it should be read to the witness, before he leaves the stand ; and a judge has no right to add to, or take from it any thing, without recalling the witness, although his recollection may be clear that the witness stated what he adds. To do otherwise would be recording the recollections of the judge of the statement of the witness, and not the statement itself.

In the present case, the words added were very material. We have, therefore, noticed this bill particularly, with the view of establishing an inviolable rule, in regard to taking down testimony ; but in coming to a decision upon this case, have entirely excluded those words from our consideration, so that the defendant suffers no injury as his cause was not tried by a jury.

The second bill is to the refusal of the judge to compel a broker, who was examined in order to fix the market value of certain stocks, to disclose the names of the different persons to whom he had sold such stocks. The broker objected to answering, stating that he considered his transactions with other individuals as confidential and appertaining to themselves, but that if the court said he must answer, he would do so. The judge refused to compel the witness to disclose the names of the different purchasers, as there was no intimation of any intention to call on them to testify in contradiction to the broker, and the names were therefore immaterial. We think the judge decided correctly.

The third bill we consider as raising no question material in the case. The fourth relates to striking out the plea in compensation

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and demand in reconvention, which has been settled by the decisions previously referred to. The fifth and last has also been decided, as it relates to the refusal of the judge to have witnesses attached, to prove the demands in reconvention and the plea in compensation.

Previous to the trial, the defendant made an affidavit, for the purpose of having his witnesses attached. In it, he stated what he expected to prove by them; and the plaintiff admitted, that if the witnesses were present, they would swear to what the defendant stated, reserving his objections to the admissibility of the evidence, and his right to show all the facts. This affidavit the defendant offered as evidence on the trial. He states that he had, at different times, transferred to the plaintiff twelve shares of City Bank stock for \$600, and ten shares of Exchange Bank stock for \$500, which he accepted for \$1100, the plaintiff assuming to pay the amount of certain notes owing for the stock, or secured upon it; and, further, that the stock was worth at least \$950, and *would pay* the present demand. There is no direct allegation that the stocks were accepted in payment, but an inference to that effect is attempted to be drawn.

The evidence really given on the trial shows, that Ferrand purchased the City Bank stock on a credit, and had not paid for it. That he gave his note to secure the price, which was endorsed by Jonau, to whom the stock was transferred some time after, to secure him as such endorser. It is shown that the note has not yet been paid; and further, that Ferrand had borrowed \$600 of the City Bank on a pledge of the stock, previous to the transfer. The amount of the note endorsed by Jonau, is not shown; but, from the statement of the witness Bergerot, it is at least \$400. He says, that was considered an available balance on it, and that Ferrand told him the stock would secure Jonau on his endorsement to that amount. It is proved that the City Bank stock was worth about \$80 per share; so those twelve shares may be considered as absorbed by the two notes.

The Exchange Bank stock, the defendant states in his affidavit, was accepted at \$500; and the plaintiff admits that the witnesses will swear to it; and he must abide by the consequences, unless he can explain or disprove it in such a manner as to avoid

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the effect of the admission. This he attempts to do, by showing that only \$50 per share was paid on the stock, and that it was worth but \$15 in the market. But he does not show that he took it at the market price. He further relies on that portion of the defendant's answer which was stricken out, in which he says that the Exchange Bank stock was transferred to the plaintiff, to secure him for any liabilities he might then, or at any future period, be under, on account of endorsements as well as of moneys lent, or otherwise; and on this the judge also relies in his judgment. Allowing the plaintiff the benefit of all this, he fails to sustain his case, as he does not show that he is under any other liabilities for the defendant, other than those secured by the City Bank stock, or that he has lent him any money other than the sum claimed. We think the effect of the plaintiff's admission has not been avoided, and that he must consequently give credit for the \$500.

The judgment of the City Court is, therefore, reversed, and it is ordered and decreed, that the plaintiff recover of the defendant, the sum of four hundred and fifty dollars, with interest at five per cent from judicial demand, to wit, the 28th of August, 1841, until paid, and the costs in the inferior court, those of this court to be paid by the plaintiff.

THE SECOND MUNICIPALITY OF NEW ORLEANS v. JAMES H.
CALDWELL and another.

Sect. 4 of the act of 14th March, 1816, which provides that "neither the Mayor, Recorder, nor any Alderman then in office, shall be allowed, in his own name, or through the medium of others, to become a lessee or bidder for any branch of the revenues of the city, nor for any work or undertaking whatever which may be authorized or ordered by the corporation of the city of New Orleans," cannot be considered as prohibiting such persons from leasing any lot of ground or other property, not forming an entire branch of the revenue of the city.

APPEAL from a judgment of the Commercial Court, *Watts, J. Rawle*, for the plaintiffs.

Carter, for the appellant.

SIMON, J. James H. Caldwell is appellant from a judgment

which condemns him and his co-defendant to pay the amount of several promissory notes. Their answer avers that the notes sued on were given for the lease of certain lots adjudicated to them ; that the adjudication is a nullity ; and that they have acquired no title by the adjudication to the leased property.

The record contains the following admissions : 1st. That the notes sued upon were given for the lease of certain lots in the city of New Orleans, leased by the defendants from the plaintiffs. 2d. That at the time of the lease, the defendants were Aldermen of the Second Municipality. 3d. That the property was leased for a term of years, not yet expired.

Under the above admissions, it is contended that the contract of lease, in consideration of which the notes sued on were given, is absolutely void, as the defendants, who were Aldermen at the time the notes were executed, were incapacitated by law from entering into such contract with the plaintiffs ; and in support of this position, we are referred to the fourth section of a law of the 14th of March, 1816, (Bullard & Curry's Dig. p. 102, § 35,) which says, that " in future, the Mayor, Recorder, nor any of the Aldermen then in office, shall be allowed, either in his own name, or through the medium of other persons, to become *the lessee or bidder for any branch of the revenues of the city*, nor for any work or undertaking whatever, which may be authorized, or ordered by the corporation of said city." The French text of the law is : "*ne pourra se rendre fermier, ou adjudicataire de la perception d'aucune branche des revenus de la ville.*"

We think the law relied on by the defendants does not cover the present case. It is true it incapacitates the Mayor, Recorder and Aldermen from becoming the lessees or bidders for any branch of the revenues of the city, but it seems to us that its terms cannot be so construed or extended, as to prohibit them from leasing any lot of ground or other property of the city. Although revenue may be derived from the leasing of such property, surely, it cannot be said that they become lessees of a whole branch of the revenue. We understand the expressions used in the law, which in the French text are very clear, to mean that a branch of the revenue, that is to say, the collection of any species of revenue, which, with the other branches, is to form the whole annual in-

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come of the city, shall not be leased to the persons therein named. In the one case, it is the revenue itself which becomes the object of the contract of lease, whilst in this case, it is limited to certain property which produces revenue, but which is only a portion of a particular branch thereof. For example: it is well known that every year all the stalls of the market house are offered at auction in a lump, and are adjudicated to the highest bidder. This bidder becomes the lessee of a branch of the revenues of the city, to wit, the revenue derived from the market house. This lessee pays a certain amount of rent to the corporation, with a view to speculate upon this branch of the revenue, by selling or leasing at a certain profit, the use of every stall separately to the butchers and other retailers of provisions. The law relied on may have been passed for the purpose of preventing the Mayor, Recorder and Aldermen from speculating on the public revenue of the city, or from monopolizing any branch thereof, to the injury of the citizen; but, in our opinion, it never was intended to forbid them from taking the lease of a lot of ground, or of any other specific property of the city.

Judgment affirmed.

FRANÇOIS GERBER v. LOUIS MARZONI.

The jurisdiction of the Supreme Court is to be determined by the value of what is claimed in the petition, not by the amount allowed by the judgment.

Action for \$90 paid to defendant, in error, as owner of a butcher's stall, and for \$3000 damages for forcibly turning plaintiff out and retaining the possession of the stall. Plaintiff having obtained a rule on defendant to show cause why he should not be put in possession, it was made absolute, and defendant appealed. *Held*, that the court erred in ordering a part of the case to be tried on a rule, and leaving the remainder untried. A cause should not be tried on any other day than the one fixed by the court, when called in its turn. C. P. 463.

APPEAL from the District Court of the First District, *Buchanan, J.*

Grivot and Castera, for the plaintiff.

Preaux, for the appellant.

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MARTIN, J. The plaintiff claims the sum of ninety dollars, erroneously paid to the defendant for the hire of a butcher's stall in the market of New Orleans, of which the latter pretended to be the owner; and the further sum of two thousand dollars, for damages alleged to have been sustained by him in consequence of having been violently driven from the stall, and forcibly kept out of it by the defendant. The plaintiff concludes with a prayer, that he be restored to the possession of the stall. Before any answer was filed, the plaintiff obtained a rule on the defendant to show cause why he should not deliver to the plaintiff, and put him in possession of the stall. The defendant afterwards filed his answer, averring that, by a contract between them, he ceded to the plaintiff the use and possession of a stall which he occupied, and that the plaintiff promised to pay him therefor the sum of twenty dollars, monthly, &c. The rule was made absolute, the court being of opinion that the contract, stated in the answer, was illegal and contrary to public policy. The defendant has appealed. The plaintiff prays for the dismissal of the appeal, on the ground of want of jurisdiction in this court; nothing in the record, showing that the matter in dispute in the rule, to wit, the use and possession of the stall, was worth more than three hundred dollars; and also on the ground, that the rule decides the principal matter in controversy, to wit, the plaintiff's right to the use and possession of the stall. Our jurisdiction is to be tested by the value of what is claimed in the petition, and not by what is allowed by the judgment. The value of what is claimed in the present case exceeds, by a great deal, the sum of three hundred dollars. Whatever may be the amount of a judgment given, either party has a right to an appeal. That of the defendant, therefore, cannot be dismissed. On the merits it appears to us improper to try a case by partial rules to show cause. The Code of Practice, art. 463, requires, "that the clerk shall set down the cause on the docket of the court, in order that it be called in its turn, and a day fixed for its trial." The trial is not, therefore, to take place on any other day than the one, fixed by the court *when it is called in its turn*; and there ought to be but one trial. The court, in our opinion, erred in ordering the trial of part of this case on a rule to show cause, before

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it was called in its turn, and leaving the remainder of the case untried.

It is, therefore, ordered, that the judgment be reversed, the rule discharged, and the case remanded for further proceedings, according to law and the opinion above expressed ; the plaintiff and appellee paying the costs of the appeal.

CASIMIR BEAUDOUIN v. VICTOR ROCHEBRUN.

APPEAL from the District Court of the First District, *Buchanan, J.*

MARTIN, J. The facts of this case, and the pleadings, are exactly the same as in that of *Gerber v. Marzoni*, just decided ; except that, in the present case, the defendant took a bill of exceptions to the opinion of the court overruling his objection to the case being tried on a rule to show cause, especially as he had prayed for a jury, which had not been done in the former case. This last circumstance strengthens his claim to the reversal of the judgment, which would have been sufficiently strong without it.

It is, therefore, ordered, that the judgment be reversed, the rule discharged, and the case remanded for further proceedings according to law ; the plaintiff and appellee paying the costs of the appeal.

Grivot and Castera, for the plaintiff.

Rousseau, for the appellant.

THE MECHANICS AND TRADERS BANK OF NEW ORLEANS v. ANDREW HODGE and another.

Plaintiffs having obtained a judgment against the defendants, seized, under a *fi. fa.*, all the rights, credits, money, and other property of defendants, in the hands or under the control, of the Receiver of Public Moneys at New Orleans. A draft from the Commissioner of the General Land Office on the Receiver, in favor of one of the defendants, was presented for payment after the seizure, which was not accepted, there not being, at the time, sufficient funds in the hands of the Receiver. The draft was subsequently given up by the holder, and the instructions to pay it revoked. On a rule on the Receiver, to show cause why he should not pay over the money in his hands belonging to defendant: *Held*, that the Receiver had no funds belonging to the defendant; that the money belonged to the United States, and until paid over remained under the control of the government; that the mere order to pay, did not, of itself, transfer to the defendant any money in the hands of the Receiver, but was, at most, only an acknowledgment of the debt.

A rule cannot be taken on an officer of the United States, in his official capacity, to show cause why he should not pay over money, seized in his hands under a *fi. fa.*, as the property of a third person. To condemn him to pay as an officer, would be to condemn the government, which cannot be done.

APPEAL from the District Court of the First District, *Buchanan*, J.

This case was submitted, without argument, by *L. Peirce*, for the appellants, and *I. W. Smith*, for the defendants.

MORPHY, J. The plaintiffs having obtained a judgment against A. Hodge, took out a *fi. fa.*, under which the sheriff seized, in the hands of A. S. Lewis, the Receiver of Public Moneys for the government of the United States in this place, all the goods and chattels, lands and tenements, rights, credits, &c., belonging to A. Hodge, which he might have in his possession or under his control, and especially the amount of a certain draft or bill of exchange drawn by the government of the United States on the said Receiver, in favor of A. Hodge. The sheriff's return concludes by stating, that from this seizure nothing came into his hands. A rule was sometime after taken by the plaintiffs on the Receiver, Lewis, to show cause why he should not pay over to the sheriff the moneys seized in his hands, belonging to A. Hodge, under their execution against him. The judge below having discharged the rule, after hearing the parties, the plaintiffs appealed.

The Mechanics and Traders Bank v. Hodge and another.

The record shows that the seizure was made in the hands of the Receiver, on the 30th of July, 1842. That on the 22d of August following, a draft for \$2858 27, was drawn by the government on the Receiver of the Public Moneys, in favor of one George May, as attorney for A. Hodge, but that when presented, that officer refused to accept it, not having sufficient funds in hand. It further appears that, on the 20th of September following, the draft having been given up by George May, was cancelled, and the instructions given to pay its amount, revoked by the General Land Office.

Under these facts, it is clear that nothing was ever seized under the execution of the plaintiffs. The Receiver had no funds in his hands belonging to A. Hodge, either at the time of the seizure, or since. Whatever moneys he had in his possession as Receiver, always belonged to the United States. The draft subsequently drawn, was never accepted. So long as its amount was not paid over, it remained under the control of the government, which could revoke previous instructions to its agent in relation to it. The mere order to pay A. Hodge a certain sum, did not, of itself, transfer to him any moneys in the hands of the Receiver to an equal amount. It was, at most, an acknowledgment of his claim on the United States. But leaving out of view the facts of the case, it is not easy to perceive how the rule taken in this case could, under any circumstances, be entertained against A. S. Lewis, in his official capacity; for, being only an agent of the government, to condemn him to pay, as Receiver, would be condemning the government itself, which was not amenable to the court below.

Judgment affirmed.

Norcross and another v. Theurer.

HENRY A. NORCROSS and another v. GASPARD THEURER.

A credit which appears to have been endorsed on a note while in the possession of the payees, will be binding on them, unless they show it to have been made through error.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

MORPHY, J. This appeal has been taken from a judgment rendered on a promissory note for \$407 73. The error complained of is, that the judge below allowed the full amount of the note, when on the back of it a credit of \$100 is endorsed, reducing plaintiffs' claim to \$307 73. As such an endorsement exists, and appears to have been made while the note was in the possession of the petitioners, who were the payees, they must, we think, be bound by it, unless they show, which has not been done, that it was made through error. Civ. Code, art. 2246. 2 Pothier, Oblig., No. 726.

It is, therefore, ordered, that the judgment of the Commercial Court be so amended, that the plaintiffs recover from the defendant only three hundred and seven dollars and seventy-three cents, with five per cent interest thereon, from the 14th of April, 1842, until paid, and two and a half dollars costs of protest, together with costs below, those of this court to be borne by the appellees.

Benjamin, for the plaintiffs. *Hiestand*, for the appellant.

ABRAHAM F. RIGHTOR v. JOHN SLIDELL.

Where, in an action against the maker of a note, in whose hands different creditors of plaintiff have seized all sums due by him to the latter, defendant denies that he is indebted to the plaintiff, he will not be exempted from the payment of interest, on the ground of his uncertainty as to whom he should pay. Having denied that he was at all indebted, he cannot allege that he was prevented from paying by any uncertainty as to whom he should pay.

Where different seizures have been made in the hands of defendant, of whatever sums may be due by him to plaintiff, on a judgment in favor of the latter, execution will be stayed until the seizures are proved to have been satisfied or abandoned. No law authorizes a judgment ordering the amount to be deposited in court, subject to the claims of the seizing creditors.

Rightor v. Slidell.

APPEAL from the District Court of the First District, *Buchanan*, J.

Larue, for the plaintiff.

T. Slidell, for the appellant.

MORPHY, J. The defendant is sued on a note of \$3587 85 $\frac{1}{2}$, drawn to the order of the plaintiff. He admits his signature, but avers that the plaintiff cannot maintain this action, because the amount of the note in suit, and all sums by him owing to the plaintiff, have been seized in his hands by the creditors of the latter, under writs of *feri facias* issued from the United States Circuit Court, and from several of the State courts. He further pleads in compensation and reconvention, the amount of two notes of \$2666 66 $\frac{2}{3}$ each, on which he alleges that the plaintiff has become liable to him, as endorser, and prays for judgment for the balance in his favor. To this demand in reconvention, the plaintiff, Abraham F. Rightor, answered, by denying defendant's right or title to the notes set up as an offset, and averring that if he has any title, he acquired it after the notes had been extinguished by compensation, in the hands of Charles F. Zimpel, to whom they formerly belonged, by three notes of the latter amounting to \$10,771 56, on which he (plaintiff) obtained judgment against Zimpel on the 7th of April, 1840. Plaintiff further averred that he was ignorant that his demand against the defendant was seized by virtue of any execution, but, if such were the case, that he was perfectly willing the defendant should pay the amount due in satisfaction of any just debts of his. Judgment was rendered below, decreeing defendant to pay \$3587 85 $\frac{1}{2}$, with legal interest from the day of protest; but ordering the money, when made on execution, to be deposited in court, subject to the claims of the seizing creditors. The defendant appealed.

The pleas of compensation and reconvention have not been much insisted on in this court, nor could they be pressed with any success. The evidence shows clearly that the two notes of \$2666 66 $\frac{2}{3}$ each, endorsed by the plaintiff, had been paid and extinguished by compensation, in the hands of Zimpel, long before they came into the possession of the defendant, who purchased them at a sheriff's sale as the property of Zimpel. It is contended that the judge below erred, in allowing interest on the amount

of the note seized in defendant's hands by different creditors, as defendant could not take upon himself to decide upon the validity or priority of these seizers, and as it was the business of the plaintiff to have these questions decided contradictorily among his own creditors; and we have been referred to the case of *Miles v. Oden et al.*, 8 Mart. N. S. 214, in which we held, that interest will not be allowed on a note given for the purchase of slaves, where there is a contest between two adverse parties about the proceeds, which places the maker in great uncertainty as to whom he has to pay, because the debtor, in such a case, cannot be considered *in mora*.* This argument, and the authority adduced in support of it, would perhaps be entitled to some weight, had the defendant admitted his liability to the plaintiff, and been prevented from paying only by some such uncertainty; but he has been contending throughout, that he is not indebted at all to the plaintiff. Until the defence set up by him in this suit was decided upon, no steps could be taken by the seizing creditors to compel him to pay, or to have their rights, under their seizures, adjusted. Had they made him a garnishee, and propounded interrogatories to him under the act of the 20th of March, 1839, he would not probably have acknowledged any indebtedness to the plaintiff, and no order of payment could have been obtained against him. B. & C.'s Dig. 458. Under such circumstances, the defendant must be considered *in mora*, and is bound to pay interest from the day of protest; but the money has, we think, been improperly decreed to be paid into court. We know of no law which authorizes the judge, in a case like the present, to make any such order.

It is, therefore, ordered, that the judgment of the District Court be affirmed, except that part of it which orders the money, when made on execution, to be deposited in court; and it is further ordered, that execution be stayed in this case until the plaintiff proves, to the satisfaction of the court below, that the several executions levied in defendants' hands have been satisfied or abandoned. The costs of this appeal to be borne by the plaintiff and appellee.

* The note sued on, did not bear interest on its face.

Hazard v. Lambeth and others.

T. Slidell prayed for a re-hearing, as to so much of the judgment as condemns the defendant to pay interest. The sums claimed by the seizing creditors exceeded the amount of defendant's note, and the latter could not take upon himself the risk of deciding to whom payment should be made. How, then, can it be said that he was in default, and liable for interest, *ex mora*. Under such circumstances, interest is not due. See Sergeant on Attachment, 166. *Fitzgerald v. Caldwell*, 2 Dallas, 215. Interest, *ex mora*, is in the nature of damages for the non-performance of a contract to pay money. 12 La. 530.

As to the defendant's denial that he owed the debt, it is sufficient to say, that a party may plead various grounds of defence, if not inconsistent. In the case from Dallas, the defendant denied the debt; but having been garnisheed, was relieved from interest during the period of the garnishment.

Re-hearing refused.

ROWLAND G. HAZARD v. WILLIAM M. LAMBETH and others.

One acting as an agent, will not be liable, personally, to a party aware that he acts as such.

A party, who seeks to render another liable for the debt of a third person, must prove such liability beyond all doubt, or he cannot recover. C. C. 3008.

Mere voluntary payments, on some previous occasions, will not, of themselves, create an obligation to pay under future, though similar circumstances.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

MORPHY, J. The defendants have appealed from a judgment decreeing them to pay sundry drafts of the plaintiff on them, amounting to \$6229 97. These drafts are founded on orders for negro clothing, which the petitioner, who is a manufacturer residing in Rhode Island, was in the practice of obtaining from a number of planters living on Red River, and in other parts of the State. The orders are all as follows, to wit: "You are requested to ship for me yearly, until otherwise ordered, the following goods, consigned to the care of W. M. Lambeth & Thompson, or successors,

New Orleans, who are hereby requested to authorize your draft on them for the amount, *for my account*, and, on receipt of bill of lading, or other evidence of shipment, to accept the same, payable 10th of January after. Winter clothing to be shipped by 1st of August, and summer clothing by 10th of March, each year." To these orders were appended lists of the articles required, consisting of negro clothing. From an inspection of these orders it is evident, that they were intended to be submitted for the approbation and acceptance of defendants. On the face of, and across, each order, the words "draft authorized as herein requested," are to be found; but for reasons which have not been explained, the signature of the defendants was never solicited by the plaintiff, who, it appears, was in the habit of furnishing them with duplicate copies of these orders. In pursuance of this arrangement, the goods ordered were annually sent from the north, consigned to W. M. Lambeth & Thompson, or Lambeth, Thompson & Co., to whom the plaintiff forwarded the bills of lading, enclosed in letters of advice of the following tenor, to wit:

"I hand you bill of lading for one bale, for account of J. Chambers, Esq., in conformity to whose instructions I draw on you for the amount, \$342 09, payable 10th of January next. Invoice is forwarded to Mr. C. by mail.

"Yours respectfully,

"R. G. HAZARD."

On the arrival of the goods, the defendants were in the habit of forwarding them to the planters whose business they did; and, with a few exceptions, they accepted or paid the drafts drawn on them under these orders. The goods in relation to which the difficulty arose, were shipped in June or July, 1841, received here in August, and immediately forwarded to those who ordered them respectively, but the defendants declined accepting or paying the drafts drawn on them by the plaintiff; whereupon the present suit was brought.

The inferior judge was of opinion that by receiving and forwarding the goods, when they knew that under the orders they were to accept the drafts, the defendants made themselves liable to the plaintiff as fully as if they had actually accepted them.

From the terms of these orders and the evidence, it appears to

us that, even had the defendants assented to the agreement between the plaintiff and the planters, and accepted the drafts sued on, they would have incurred no personal responsibility, so long as the drafts thus accepted did not pass into the hands of third persons. The defendants, who were, in New Orleans, the commission merchants of the planters with whom the plaintiff was treating in different parts of the country, were requested to authorize his drafts on them, and, therefore, to accept them *for the account* of those who gave the orders, on the receipt of the bill of lading or other evidence of shipment. The understanding seems to have been that the defendants should be a channel of communication between him and them, to receive and forward the goods, and accept his drafts for them; and that, through the defendants, the purchasers should pay such drafts by placing funds in their hands on the 10th of January. Had plaintiff considered the obligation of Lambeth & Thompson in a different light, it is difficult to suppose that he would have neglected to secure their personal liability, by getting them to sign the authorization to draw, written on the face of the orders. He was contented with furnishing them with duplicates of the orders, as a guide for the course they were to pursue. We, accordingly, find plaintiff forwarding directly to the planters invoices of the goods shipped, and sometimes reminding them that he would draw on their factors for the amount, payable on the 10th of January following. In a letter addressed to Chambers, one of those who gave the orders for goods, he says: "Messrs. Lambeth & Thompson decline accepting my bills for your account, waiting advice from you on the subject. The number of bills similarly situated is a very serious inconvenience to me, and I must, therefore, solicit your attention to it with as little delay as practicable. I annex a draft for the amount, payable at the time specified in the order, and will be much obliged by your signing and returning it to me, to the care of S. Robert, New Orleans.

"This will probably be the most satisfactory mode to your agents here, and at the same time produce least delay, which, I assure you, is, at this time, very important to me.

"Yours truly,

"R. G. HAZARD."

In this letter, written from New Orleans, and bearing date the

24th of December, 1841, long after the goods of Chambers had been forwarded to him, the plaintiff makes no complaint against the defendants for refusing his drafts, nor does he intimate that they are personally liable to him in any way. After the 10th of January following, plaintiff called upon Audrey, another planter who had ordered goods. He informed him that Lambeth & Thompson had not paid his bill, and that the reason of it was, that he (Audrey) had not sent down his crop. He wished to know how soon he proposed to send it to them. Audrey further testifies, that when he gave orders to Hazard, he thought of paying him through the defendants, and expected to have funds in their hands to meet his drafts on them. That this arrangement was more convenient for Hazard, for whom it would have been a great deal of trouble to go round the country to collect the amounts due by the several planters for the goods he sold. On another occasion, plaintiff, who had an agent in New Orleans, stopped in the hands of defendants, goods which had been shipped for J. M. Smith, another planter; and gave, as his reason for so doing, that he did not believe that Smith was good. In answer to a letter of the defendants, reminding plaintiff that they had already advised him, that they would only accept under special directions from the planters, given each year, he says: "In regard to the drafts, I have always made it a point to draw on you *through Bank*, only for those about whose accounts I supposed there could possibly be no question, and for whom you would be willing to accept, such as General Thomas, Carnel, and a few others;" thus explicitly admitting that it was optional with the defendants to accept or refuse his drafts, and not cautioning them to keep or return the goods, in case they should see fit not to accept or pay his drafts. Upon the whole, we think that the defendants acted, and were considered throughout, only as agents. As such, they could not be held liable to plaintiff, even had they accepted his drafts, because he knew the circumstances under which such acceptance would have been given. 3 Mart. 640. 10 La. 390. But even had we any doubt as to the capacity in which it was intended that the defendants should act under these orders, we should still come to the same conclusion, because it behoves the party who seeks to render one person liable for the debt of another, to show such liability

beyond all doubt. Civ. Code, art. 3008. If such be the case, the defendants cannot surely be made responsible for the plaintiff's claims on those who ordered the goods, when they have neither assented to his agreement with them, nor accepted the bills sued on. But it is urged that, by paying former drafts, drawn under similar circumstances, and by receiving and forwarding the goods, with the knowledge that under the orders they were to accept the plaintiff's bills, they have made themselves liable, under an implied contract. A mere voluntary payment, in some previous instances, does not, of itself, create an obligation to pay under future, although similar circumstances; and as to the act of receiving and forwarding the goods, it was a duty which the defendants were expected to perform by all parties. The plaintiff, who had an agent here, might have stopped the goods in their hands, as he did on one occasion; or he might have notified them not to forward the goods as soon as his drafts were first refused acceptance. But admitting that an implied contract can fairly be inferred from the acts of the defendants, and that they should not have forwarded the goods without accepting the drafts, it surely cannot create against them a different, or greater responsibility, than would have resulted from an acceptance of the drafts themselves. In order to render Lambeth & Thompson personally liable in either case, it should have been shown that they were provided by the planters with funds, which they failed to apply, as they expressly or impliedly engaged to do. There is no evidence that any of those who ordered the goods had funds in their hands, on the 10th of January, 1842, to pay the amounts drawn for on their agents. Most of them have declared that they considered the payments of plaintiff's bills, previously made by the defendants, as voluntary accommodations to them, as they had sent their crops to pay their debts generally, were in arrears to them, and had given no special directions in relation to the plaintiff's drafts; but that they expected defendants would pay them, as they were in the habit of furnishing their plantations with the usual and necessary supplies every year. Of the fourteen planters, for whose negro clothing the drafts sued on were drawn, five have changed their factors, and nine forwarded their cotton to the defendants last season; but it does not appear that, after paying their debts to the defendants, there remained in the

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hands of the latter funds sufficient to pay the plaintiff's bills. In conclusion, the defendants having entered into no direct or personal engagement towards the plaintiff, and not having retained or misapplied any funds placed in their hands to meet his drafts, he has no right of action against them.

It is, therefore, ordered that the judgment of the Commercial Court be reversed, and that ours be for the defendants, with costs in both courts.

Hamner and I. W. Smith, for the plaintiff.

W. M. Randolph, and *G. Strawbridge*, for the appellants.

JEROME BAYON v. JAMES WALKER BREEDLOVE and others.

A sheriff has a right to retain possession of property sold by him, during the pendency of a rule to show cause why the sale should not be set aside.

APPEAL from the District Court of the First District, *Buchanan, J.*

T. J. Cooley, for the appellants. No counsel appeared for the appellees.

BULLARD, J. The intervenors, Lawrence and Hill, are appellants from a judgment refusing to award to them damages against the sheriff, for the illegal detention of a printing establishment sold by him in this case, and purchased by them. The defence is, that a rule was taken to show cause why the sale should not be set aside for irregularities, and that, pending the rule, he was not bound to deliver the property. The record shows that, soon after the rule was discharged, the press was delivered. Pending the rule, he was justified in retaining possession. He appears to have acted in good faith, and no particular damages are shown; nor does he appear to have been put in default, after the discharge of the rule.

Judgment affirmed.

Battaille v. The Merchants Insurance Company of New Orleans.

Therèse de Fontenelle Battaille v. The Merchants Insurance Company of New Orleans.

Where a policy of insurance provides that, "in case the insured have any other insurance against loss by fire on the property, not notified to the insurers, nor mentioned in or endorsed upon the policy, or shall afterwards make any other insurance thereon, and shall not, with all reasonable diligence, give notice thereof, and have the same endorsed on the policy, or acknowledged in writing, the policy shall be void," proof that another policy was obtained on the property, which was not notified to the insured, will discharge the latter from all liability.

Where one of the conditions of a policy against fire requires, as part of the preliminary proof, without which no recovery can be had, a declaration under oath, "whether any, and what other insurance has been made on the same property," the insured will forfeit his right to recover by failing to comply with the condition.

APPEAL from the District Court of the First District, *Buchanan, J.*

MORPHY, J. This action is brought upon a policy of insurance subscribed by the defendants, whereby they undertook to insure the plaintiff from loss, by fire, on dry goods, millinery, fancy goods, &c., contained in a brick store in Chartres street, to the amount of fifteen thousand dollars. The policy mentions that on the same stock of goods insurance had been effected in the Louisiana State, and the Atlantic Insurance Companies, to the extent of seventeen thousand dollars in each. The petitioner represents that the insurance was made by the defendants, for the space of one year from the 22d of January, 1839, and that, within that period, to wit, on the night of the 17th and 18th of August of the same year, the store, and the goods insured, were destroyed by fire. The defendants admitted the execution of the policy, but pleaded the general issue. The case was tried before a jury, who gave the plaintiff a verdict for \$7000. A motion to set aside the verdict as contrary to law and evidence, having been made, without success, judgment was rendered accordingly; and the defendants appealed.

Were it absolutely necessary for us to pronounce on the facts of this case as they appear from the record, whatever may be our respect for the verdicts of juries in general, we could with difficulty be brought to give our sanction to that obtained by the ap-

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pellee in the present instance. From the papers offered by the assured as preliminary proof, the plaintiff claims that her loss on her own stock of goods was \$45,700, independent of her fixtures, and goods on consignment. But if these documents be left out of view, as they must be, because they form no part of the legal and contradictory evidence of the case, and were admitted only to show that such preliminary proof was tendered to the underwriters, the testimony adduced by the plaintiff is of the most vague and unsatisfactory character. It does not show with any reasonable certainty the quantity or value of the goods she had in the store, at or near the time of the fire; while, on the other hand, the defendants have shown a variety of facts and circumstances, calculated to cast doubt and suspicion on her claim as being one grossly exaggerated. But our attention has been called to a point which we take to be decisive of this controversy, and which renders superfluous any comments, on our part, upon the testimony and the facts of the case. 2 Phillips on Insurance, 67.

The policy provides, "that in case the insured have already any other insurance against loss by fire on the property hereby insured, not notified to this corporation, and mentioned in or endorsed upon this policy, *then this insurance shall be void and of no effect*; and if the said insured or her assigns, shall hereafter make any other insurance on the same property, and shall not, with all reasonable diligence, give notice thereof to this corporation, and have the same endorsed on this instrument, or otherwise acknowledged by them in writing, *this policy shall cease and be of no effect*; and in case of any other insurance upon the property hereby insured, whether prior or subsequent to the date of this policy, the insured shall not, in case of loss or damage, be entitled to demand or recover, on this policy, any greater portion of the loss or damage sustained, than the amount hereby insured shall bear to the whole amount insured on the said property," &c.

The policy sued on mentions only two insurances besides that undertaken by the defendants, one effected in the office of the Louisiana State Insurance Company, and one in that of the Atlantic Insurance Company. On the trial below, it appeared from the oral and documentary evidence introduced by the plaintiff her-

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self, that there had been a fourth policy underwritten by the Ocean Insurance Company on the same property. This insurance never having been notified to the defendants, nor endorsed on the policy sued on, nor otherwise acknowledged by them in writing, their counsel has urged that the plaintiff cannot recover, as her policy has become void and of no effect. The stipulations relied on by the defendants, are clear, explicit, and free from doubt. They apply, whether the policy taken out of the office of the Ocean Insurance Company was executed before or after the one in suit. In either case, it should have been communicated and endorsed on it. We find, moreover, if we recur to the condition, according to which this contract of insurance was entered into, that the third condition requires, as a part of the preliminary proof without which no recovery can be had, a declaration under oath "whether any, and what other insurance has been made on the same property." By failing to comply with the requirements of the policy, the plaintiff has precluded herself from the right of recovering under it. 1 Phill. Ins. 420. 16 Wendell, 400. 5 Hammond's Ohio Rep. 466. 16 Peters' Rep. 510. In the last case, in 16 Peters, it was held, that notice even of a voidable policy must be given to the underwriters, and that a mere parol notice of such insurance was not, of itself, a sufficient compliance with the stipulations of the policy; but that a prior policy should not only be notified to the company, but should be mentioned in or endorsed upon the policy declared on, otherwise the insurance was to be void and of no effect. The Supreme Court of the United States, in commenting upon the nature, importance, and sound policy of these clauses, say: "They are designed to enable the underwriters, who are almost necessarily ignorant of many facts which might materially affect their rights and interests, to judge whether they ought to insure at all, or for what premium; and to ascertain whether there still remains any such substantial interest in the insured as will guaranty, on his part, vigilance, care, and strenuous exertions to preserve the property." Whatever may be the reason of these stipulations in the policy, they were known to the insured. She has, therefore, no right to complain; for she agreed to comply, on her part, with all the stipulations, in order to entitle herself to the benefit of the contract. Upon no principle

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of law or equity can she now call upon this court to relieve her from the performance of her agreement, and yet to hold the defendants to obligations which, but for these stipulations, they never perhaps would have entered into.

It is, therefore, ordered, that the judgment of the District Court be reversed, and that ours be for the defendants, with costs in both courts.

Canon, for the plaintiff.

Grymes, for the appellants.

ASA D. GOVE V. BENJAMIN KENDIG.

An appeal will lie from a judgment on a demand in reconvention, where the sum claimed in reconvention is sufficient to give jurisdiction to the appellate court, though the original demand be under three hundred dollars; but the judgment on the latter cannot be examine into. The demand in reconvention is in the nature of a new action.

APPEAL from the Commercial Court of New Orleans, *Watts*, J. *Hiestand*, for the plaintiff. No counsel appeared for the appellant.

SIMON, J. This suit was instituted on a note of \$190 64. The defendant admitted his signature, but averred that the note sued on was given through mistake and error in fact; that there has been an entire want of consideration, as the note was given for the rent of a store, which, for the time for which the note was given, was untenable, and of no use or value to him. He further pleaded, that the premises, while in the delapidated and unfinished state in which they were during the time that the rent became due, were an absolute damage to him of more than the amount of the note sued on, and that he has sustained damage to the amount of three hundred and fifty dollars, which he sets up as a reconventional demand against the plaintiff's claim, praying judgment for the amount against the plaintiff.

Judgment was rendered below against the defendant for the amount of the note sued on, from which judgment he has appealed.

A motion has been made by the plaintiff's counsel, to dismiss

31 387
47 587

this appeal, on the ground that this court has no jurisdiction, plaintiff's claim being for less than three hundred dollars.

It is clear that the plaintiff's demand is not within our jurisdiction; and that, so far as it stands alone and unconnected with the defendant's plea in reconvention, we cannot inquire into the legality of the judgment which condemns the defendant to pay the amount sued for. But the judgment appealed from rejects also the defendant's reconventional demand, which is in the nature of a new action, and amounts to more than three hundred dollars. The right, allowed to a defendant, of reconvening, by opposing to the plaintiff a new demand, which, though different from the main action, is nevertheless necessarily connected with and incidental to it, results from arts. 374 375, of the Code of Practice. This right, which is to be exercised in the same suit, is considered by law as a new action, in which the defendant assumes the character of plaintiff. As such, he is to be heard; and if his reconventional demand amounts to more than three hundred dollars, it is clear that he, and his opponent, should be allowed the constitutional right of appealing from the judgment, which either rejects or maintains the reconvention. We think, therefore, that with regard to the defendant's plea in reconvention, the present case is within our appellate jurisdiction.

On the merits of the reconvention, it does not appear to us that any error has been committed. The evidence which has been adduced to sustain it, is so vague and so unsatisfactory, that we are at a loss to conceive how the appellant could entertain any hope of obtaining relief at our hands. His reconventional plea is clearly unfounded; and were it not that the plaintiff's original claim is under three hundred dollars, and consequently out of our jurisdiction, we should feel no hesitation in mulcting the defendant in the maximum of damages, prayed for by the appellee as for a frivolous appeal.

Judgment affirmed.

FRANÇOIS AUGUSTE v. MAGDELAINE RENARD.

Where a note, secured by mortgage, is prescribed, the mortgage is necessarily extinguished. A mortgage can only exist as an accessory to a principal obligation, with the extinction of which it disappears. C. C. 3251, 3252, 3374.

The transfer of a negotiable note, by endorsement, operates a transfer of any mortgage given to secure its payment. C. C. 2615.

APPEAL from the District Court of the First District, *Buchanan, J.*

D. Seghers, for the appellant.

F. B. Conrad, for the defendant.

MORPHY, J. The defendant being sued on a note for \$3900, secured by a mortgage on several slaves, set up, among other means of defence, the prescription of five years, under article 3505 of the Civil Code. This plea was sustained by the court below, and judgment entered up accordingly, from which the plaintiff appealed.

The appellant admits that the note is prescribed; but, seeking to separate the mortgage from the note, he contends that his claim is based entirely on the acknowledgment of defendant's indebtedness to him contained in the notarial act, and that, although he has lost all claim under the note, he can yet maintain a personal action on such acknowledgment. This case is not to be distinguished from that of *Shields v. Brundige*, 4 La. 326. It is clear that a mortgage can exist only as an accessory to a principal obligation, and that, when the principal obligation is extinguished, the mortgage is without effect. Civ. Code, arts. 3251, 3252, and 3374. By throwing the defendant's obligation to pay into a negotiable shape, and making it transferrable by endorsement and delivery, the plaintiff has subjected it to the prescription of five years, provided by article 3505. A transfer of the note, by endorsement, would have operated a transfer of the mortgage. Civ. Code, art. 2615. How then can it be said that the mortgage is not an accessory of the note, or that it can have any effect after the note has been prescribed. Troplong, *Privilèges et Hypothèques*, No. 846. *Ib.*, Prescription, Nos. 29-34.

Judgment affirmed.

Tutorship of Rose Aimée Mossy and others, Minors.

In the matter of the TUTORSHIP OF ROSE AIMÉE MOSSY and others, minor children of TOUSSAINT MOSSY, deceased.

No legal tutor can be appointed to a minor, unless both the father and mother of the minor be dead. C. C. 281.

Where a mother, the natural tutrix of her minor children, forfeits her tutorship by marrying a second time, without having previously convoked a family meeting to determine whether she shall continue as tutrix, and is re-appointed by the judge, under the advice of a family meeting, she will hold the appointment as a dative tutrix. C. P. 951.

Where the proceedings in a contest relative to the tutorship of a minor, have had no other object than to ascertain which of the parties was legally entitled to the appointment, neither having any personal interest in the matter, the costs will be ordered to be paid out of the estate of the minors.

APPEAL from the Court of Probates of the parish of New Orleans, *Bermudez, J.*

SIMON, J. Toussaint Mossy, Jr., who died in 1838, left four minor children. His widow was confirmed as their natural tutrix, but sometime in 1842, she contracted a second marriage with André Rey, and, having failed to comply with the requisites of the law, was *ipso facto* deprived of the tutorship. Thereupon, the under-tutor made application to the Court of Probates, to convene a family meeting for the purpose of deliberating on the choice of a tutor. An order was granted accordingly; but before the meeting was held, the widow presented a petition praying to be re-appointed tutrix, which re-appointment she claimed as a legal right. This application was referred to the family meeting, previously ordered. In the meantime, the grandfather of the minors, on the paternal side, petitioned the Probate Court, and prayed to be appointed tutor; but as there was a grandfather on the maternal side, the latter was cited, according to article 952 of the Code of Practice, to show cause why the petitioner should not be appointed. The widow's father answered by denying that this was a case for the appointment of an ascendant; and alleging that if it were, the mother, being the nearest ascendant, and willing to accept the tutorship, was entitled to the preference. He further averred that, if the court should be of a different opinion, he was him-

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self, for certain reasons by him stated, entitled to be appointed in preference to the petitioner.

A family meeting having been convened, acted on the application of the widow. Six members had been summoned. Five of them recommended her appointment; but one of them, the grandfather on the paternal side, insisted on his previous demand, and objected to her being appointed; which objection was also made by the under-tutor, who sustained the demand made by the father of the deceased, and sided with him.

Sometime previous, the widow had obtained leave to intervene in the issues made between the two grandfathers, and reiterated her claim to be re-appointed; and she subsequently presented a petition to the Court of Probates, praying that the deliberations of the family meeting above mentioned, might be homologated, and that she might be appointed and sworn accordingly.

On the trial of this case before the lower court, the grandfather on the paternal side, declared, through his counsel, that though he insisted on the appointment of one of the grandfathers, he was willing to yield the preference to the widow's father; whereupon the judge *a quo*, being of opinion that the circumstances of the case made the appointment of a legal tutor necessary, without the intervention of a family meeting, and that the two grandfathers who had applied for the tutorship, had, by the effect of the law, preference over the mother, who, under the present circumstances, could only be entitled to the tutorship by the appointment of the judge, ordered that Jean Baptiste Armant, grandfather of the minors on the maternal side, should be appointed their tutor, and that their mother continue to retain the superintendence of the minors and the care of their education. From this judgment, the widow and her second husband have appealed.

The widow's father, who is the principal appellee, joined issue before this court, by expressing his readiness to submit to our decision, wishing, however, that his daughter, the appellant, might be appointed tutrix of her children.

The first and principal question which this case presents is, whether the Judge of Probates could appoint a tutor by the effect of the law, to the minors Mossy, during the life time of their mother; or, in other words, whether the right given by law to as-

cendants of minors to become their tutors, can be exercised before the death of both their father and mother.

Article 281 of the Civil Code, on which the claim of the appellees is based, is in these words : "When a tutor has not been appointed to the minor *by the surviving father or mother*, or if such tutor, having been appointed, has not been confirmed, or has been excused, then the judge ought to appoint to the tutorship the nearest ascendant in the direct line of the minor." This appointment is made by the judge, without the intervention of a family meeting, which is only necessary where there are two ascendants in the same degree. Civ. Code, arts. 282, 283. Code of Pract. arts. 954, 955. The articles of our Code, upon which this question turns, were mainly borrowed from the Code Napoleon, articles 402 and 403, which contain similar provisions : "*Lorsqu'il n'a pas été choisi au mineur un tuteur par le dernier mourant de ses père et mère,*" &c. The only difference between the Napoleon Code and ours, is, that our law has not only provided for the appointment of a legal tutor, when none has been appointed by the surviving father or mother ; but also where such tutor, having been appointed, has not been confirmed, or has been excused ; whilst in the French Code, it is limited to the first contingency. It seems to us that the very expressions used in the law, "*by the surviving father or mother,*" indicate clearly that the tutorship in question only takes place after the death of *both father and mother*, and that during the lifetime of the survivor, the right of the ascendants to claim this tutorship is not open, and cannot be exercised. In support, however, of the doctrine which we are about to establish, and although the text of our law does not appear to us to be susceptible of two interpretations, let us refer to the commentators who have written upon the articles of the French Code corresponding with ours, and see how far they sustain our views upon this subject. Toullier, vol. 2, Nos. 1106 and 1107, after reciting the substance of the article 402, says : "*Mais cette tutelle, n'est admise que dans le cas où le survivant des père et mère est mort sans avoir choisi un tuteur ;*" and, among his illustrations showing the cases in which it does take place, he puts the very case now under consideration. Favard de Langlade, *verbo* Tutelle, § 2, entertains the same doctrine, and says : "*Elle n'est ad-*

mise que dans le cas où le survivant des père et mère est mort sans avoir choisi un tuteur. Si donc la mère survivante a perdu la tutelle en se remariant, il n'y a pas lieu à la tutelle légale des ascendants." This last conclusion was adopted by the Court of Cassation, who decided that article 402 was only applicable to the case of the decease of both father and mother. Sirey, 1807, 1st part, p. 156. See also Merlin, *verbo* Tutelle, sect. 2, § 2, art. 1, No. 3. Delvincourt, vol. 1, p. 108. It seems, therefore, clear, that a legal tutor cannot be appointed to a minor, unless his father and mother are *both* dead; and, in the present case, we feel no hesitation in adopting the conclusion, that, although the appellant has lost the natural tutorship of her children by contracting a second marriage, this circumstance does not give rise to the appointment of a legal tutor.

But the question will occur, under what denomination shall the new tutor be appointed? The mother has lost the natural tutorship; there is no testamentary tutor appointed by the deceased; and the ascendants, according to the opinion above expressed, have no right to claim the legal tutorship of the minors. There remains only the dative tutorship, which, under article 288 of our Code, takes place only, "when a minor is an orphan, and has no tutor appointed by his father or mother, nor any relations who may claim the tutorship by the effect of the law, or when the tutor appointed in some of the modes above expressed, is liable to be excluded according to the rules hereafter established, or is excused legally," &c. Toullier, vol. 2, No. 1107, on the subject under consideration, says: "*Si la mère survivante se remarie, et n'est pas maintenue tutrice, il faut recourir à la tutelle dative déférée par le conseil de famille; les ascendants ne sont plus tuteurs de droit.*" This is in accordance with the decision rendered in the case of *Robins v. Weeks*, (5 Mart. N. S. 379,) in which this court held, that "the mother who marries a second time, without taking the advice of a family meeting, cannot, in case of re-appointment, be considered as holding the office by natural right, but under the law." She becomes, therefore, a dative tutrix, that is to say, she holds her office under the appointment of the judge, made with the advice of a family meeting, without there being any positive obligation on the family meeting to appoint her. This is clearly the

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meaning and purport of article 951 of the Code of Practice, which, without creating another sort of tutorship, in addition to those included in the Civil Code, assimilates the mother to an ordinary dative tutor, saying : " If the minor be the child of a first marriage, and the mother has contracted a second, the judge shall not confer the tutorship on her, during the life of her second husband, except by the advice of a family meeting, duly convoked for that purpose." This law was passed for the undoubted purpose of adding another contingency to those contained in article 288 of the Civil Code, and of giving to the mother, who has lost the natural tutorship of her children, an opportunity, nay, even the right of claiming her re-appointment, and of resuming the administration of the tutorship, in the new capacity of dative tutrix. Her pretensions are to be submitted to a family meeting, who may recommend her to the judge by whom she is to be appointed, and, if appointed, she becomes subject to the same obligations imposed by law on dative tutors. She holds her office under the provisions of the law, and not by natural right.

Under this view of the case, we think the judge *a quo* erred, in appointing J. B. Armant, one of the appellees, as legal tutor to the minor children of Toussaint Mossy, Jr., deceased. As the objection made to the appointment of the appellant, was based only upon the supposed legal right of the grandfathers to be appointed in preference to the minors' mother ; and as we are of opinion that such right did not exist, the proceedings of the family meeting recommending the appointment of the appellant, ought to be homologated.

This is a family controversy, in which the sole object of the appellees appears to be to ascertain how far the widow is entitled to resume the tutorship of her children, after having lost it. Neither of them is personally interested in the matter ; and it seems that, in order to protect themselves from responsibility, their only desire is that the tutorship shall be entrusted to the party who may be legally entitled thereto. Nay, one of them has even expressed his wish that the appellant may succeed in her application, by being appointed tutrix of her children. Under such circumstances, we think that the costs incurred by the proceedings had before

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the lower tribunal, and by this appeal, should be paid out of the minors' estate, for whose benefit they were had.

It is, therefore, ordered, that the judgment of the Probate Court be reversed; that the proceedings and deliberations of the family meeting, recommending the appellant to be appointed dative tutrix of her children, be homologated; that the appellant be confirmed in the said dative tutorship, and appointed accordingly, on complying with the requisites of the law before the Judge of the Court of Probates; and that the costs in both courts be borne by the minors, to be paid out of their estate.

Canon, for the appellants.

L. Janin, contra.

NATHANIEL WOOD v. MICHAEL MULLEN and another.

A note dated the 29th of August, payable at six months, will be due on the 3d of March following.

Proof of demand of payment, at the place at which the note is payable, on or after its maturity, is essential to a recovery in an action on the note.

APPEAL from the District Court of the First District, *Buchanan*, J.

T. Slidell, for the plaintiff.

A. Hennen, for the appellants.

MARTIN, J. The defendants are appellants from a judgment on their promissory note. They resisted the claim on an allegation that the plaintiff was not the owner of the note sued upon, but that it is the property of Taylor & Brothers, against whom the defendants have a demand, which they are entitled to plead in compensation. The defendants did not establish their plea; but they contend that judgment ought to have been given against the plaintiff, because he has not complied with the pre-requisite of the law, by making a demand at the place indicated on the face of the note for its payment, on or after its maturity. They state that the note bears date the 29th of August, 1841, and was made payable at the Phoenix Bank, six months after date. The petition alleges no

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demand except one, which was made on the second day of March following. The note being due six months after the 29th of August, was so on the 28th of February following, and did not become payable till after the expiration of the three days of grace, to wit, on the 3d of March. This mode of calculating the day of payment of a note, is according to the jurisprudence of this court, as settled in the case of *Wagner et al. v. Kenner*, 2 Robinson, 120 ; and according to the same jurisprudence, a demand of payment, at the place indicated in the note, on or after its maturity, is a pre-requisite to the right of recovery.

The certificate of the judge that the record contains all the evidence is sufficient, independently of that of the clerk. We, therefore, considered it useless to inquire whether the latter can properly certify to that effect, when he has not been called upon to take down the evidence on the trial.

It is therefore ordered, that the judgment be reversed, and that ours be for the defendants, as in case of nonsuit, with costs in both courts.

FELIX GROS v. ROSALIE LUPELLE BIENVENU.

Concealment by the vendor of any vice or defect in a slave, is no fraud, unless such vice or defect would furnish ground for redhibition.

APPEAL from the District Court of the First District, *Buchanan, J.*

Train, for the plaintiff.

Beauregard, for the appellant.

MORPHY, J. The defendant enjoined executory proceedings instituted to recover of her a balance due on the price of a slave named Maria, and her two children, François aged six years, and Joseph about two years, sold to her by the petitioner. She alleges that the latter, in the act of sale, warranted said slaves to be free from the vices and maladies provided against by law, but that in so doing he practiced upon her a gross fraud, as the slave Maria was addicted to drinking, had run away from him

prior to the sale, and had been lodged in jail as a runaway, from which place the plaintiff took her, and paid a reward for her apprehension; and as Joseph, one of her children, was, at the time of sale, attacked with an incurable disease, of which he died shortly after. She avers that the plaintiff represented the sickness of the child as having been caused by the measles, and as a slight affection that would shortly pass away, but that such representations were untrue and made only to entrap her, &c. On a rule to show cause why the injunction should not be set aside, the inferior judge, after hearing the evidence, made the injunction perpetual to the amount of fifty dollars, as being the value of the child, Joseph, and dissolved it for the residue of the claim. The defendant appealed, after ineffectually attempting to obtain a new trial.

The evidence adduced has not shown Maria to be addicted to drinking, nor to have been in the habit of running away, as that habit is defined by article 2505 of the Civil Code. It appears, however, that while she was in the possession of the plaintiff, who employed her at times in selling milk and ice cream in the evening, she did not, one night, return to her master's house, and that, at his request, she was arrested by the city guard a day or two after, and lodged in the jail of the Third Municipality, out of which she was taken by the plaintiff, who paid for her apprehension. It is not pretended that before or since this time, she ever left the service of her former or present master; and a number of witnesses, some of whom have owned the girl, testify that she has always borne an excellent character. The appellant's counsel has contended that there was fraud, on the part of plaintiff, in not apprising her of what Maria had done, and in stating to the broker, through whom the bargain was made, that she was a good girl, and had never run away. As Maria had committed but this single transgression, which, under the circumstances, and considering her general good behavior, the plaintiff did not perhaps regard as an actual running away, he might well have believed himself under no obligation to communicate it to the purchaser; nor do we think that he was bound to do it. In the case of *Xenes v. Taquino et. al.*, 7 Mart. N. S. 678, we said that, "unless the vice or defect of a slave was one which furnished a ground for redhibi-

tion, there was no fraud in concealing it." The case relied on, of *Gaillard v. Labat et al.*, (9 La. 18,) is widely different from the present. In that the slave was *addicted to drunkenness*, unworthy to be trusted, and unfit to be used as a house servant, and she was sold as a *confidential* and *first rate house servant*, trusty, sober, and honest. The court was of opinion that the false assertion of qualities which the slave did not possess, and the concealment of her vices and defects, constituted such a fraud, under article 1841 of the Civil Code, as should vitiate the contract. In the present case, the sale contains the usual guarantee against the vices and maladies provided against by law. Under such a clause, the purchaser cannot complain that the vendor did not disclose a fact which furnishes no ground for redhibition, and which does not necessarily detract from the value or usefulness of the slave sold. The concealment of it has occasioned no loss or inconvenience to the defendant, nor has it procured to the plaintiff any unjust advantage, as the price given for the three slaves, to wit, \$1250, cannot be considered in any way extraordinary. After the note sued on was protested, the defendant endeavored to make an arrangement with the plaintiff, and offered him an additional mortgage on a lot of ground. Up to that time, which was more than six months after the sale, she appeared satisfied with Maria; and complaints about her were heard only after the proposed arrangement had failed, and the present suit was about to be brought.

As relates to the child, Joseph, who died shortly after the sale, Formento, a physician, says that he was called to see him at the defendant's house, in September, 1841, the very month in which the sale took place. That he found the boy in a state of *marasmus*. That he was so low that he could not tell what was the cause of his disease, but that the child must have been sick at least two or three months before he saw him, &c. From this portion of the testimony, coupled with that of the broker, it is clear that, at the time of the sale, the child was sick of the disease of which he died shortly after. We cannot say that the judge erred, in fixing fifty dollars as a fair allowance for the child, Joseph, out of the \$1250 given for the family. As he was then sick to defendant's knowledge, and was very young, the value set upon him must have been very small, in proportion to that set

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upon the mother, who was a good washer-woman, and the brother who was six years of age, both of whom were conveyed by the same bill of sale.

Judgment affirmed.

EX PARTE JOHN BORDEN.

The first section of the act of 25th March, 1831, which provides that whenever the Parish Judge of any parish is disqualified by interest, or otherwise, to try any case in the Parish Court, that the District Court shall have jurisdiction thereof, and that the same shall be transferred by the Parish or Probate Court to the District Court, does not contemplate the transfer of all the mortuary proceedings and documents relative to any estate in which the Judge of Probates may be interested. The District Court may take cognizance of the appointment of a curator, where the Probate Judge is interested; but it is not necessary for this purpose, that the papers relative to the succession should be removed from their proper place of deposit.

APPLICATION for a mandamus to the Judge of the Court of Probates of Jefferson, *Dugué, J.*

Wolfe, for the applicant.

BULLARD, J. John Borden has moved the court for a mandamus, to compel the Judge of the Court of Probates for the parish of Jefferson, to transmit to the Court of the First Judicial District, the papers relative to the succession of James Borden, deceased, in pursuance of the act of 25th of March, 1831,* on a suggestion that the Probate Judge is interested in the matter, having formerly acted as attorney of the absent heirs. This transmission of the papers relative to the estate, is asked, with the

* This act provides—

Sect. 1. That whenever the Parish Judge of any parish is interested in any cases brought, or which may be brought, in the Parish Court or Court of Probates, or is related to either of the parties, so as to be incapable of trying such cases by the existing laws, or is disqualified in any other way by law from trying such cases, the District Court shall have jurisdiction thereof, and the same shall be transferred by such Judge of the Parish Court or Court of Probates, to the District Court.

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view of obtaining from the District Court the appointment of a curator to the estate.

We are of opinion that the act referred to does not contemplate, that all the mortuary proceedings and documents relative to an estate in which a Judge of Probates may be interested, shall be transferred to the District Court. Jurisdiction is given to the District Judge in such cases; and if a case be already pending in the Probate Court, the record of that case may, perhaps, be transferred to the District Court. But, in a case like the present, the District Court would be authorized to take cognizance of an application for the appointment of a curator, on its being shown, to its satisfaction, that the Judge of Probates is incompetent, in consequence of interest, without requiring the papers relative to the succession to be removed from their proper place of deposit.

Motion overruled.

WILLIAM LEDYARD HODGE v. MICHAEL MOORE.

Art. 2535 of the Civil Code, which provides that where a purchaser, who was not informed before the sale of the danger of eviction, is, or has just reason to fear that he will be disquieted in his possession, by any claim, he may suspend the payment of the price until he be restored to quiet possession, unless the seller prefer to give security, does not contemplate the case in which a purchaser's fear of being disquieted arises from a naked point of law. Every one is bound, at his peril, to know the law.

To put the purchaser in default, the vendor must tender for his signature, an act drawn up in strict conformity to law, and such as the former is bound to sign.

Where, in an action against the purchaser of property sold at auction who had failed to comply with the terms of the sale, for the difference between the price bid by him and that at which it was adjudicated on the second exposure, and for the expenses subsequent to the first sale, it appears that the act of sale prepared by a notary and tendered to defendant, was unaccompanied with the certificate required by law, showing what privileges or mortgages existed on the property, the defendant will not be considered to have been put *in mora*. C. C. 2589, 3328.

The putting a debtor in default, is a condition precedent to the recovery of damages for the violation of a contract. The want of it need not be pleaded, but may be taken advantage of at any time. C. C. 1906.

APPEAL, by the plaintiff, from a judgment of the Commercial Court of New Orleans, *Watts, J.*

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MORPHY, J. This suit is brought to recover the difference between the price at which two lots of ground were adjudicated to the defendant, and that which they brought on a re-sale at public auction, on his refusal to comply with and carry into effect the first adjudication.

It appears that the defendant, having purchased, in February, 1837, the two lots in question, submitted the plaintiff's title to his counsel for examination. The latter found it good; but, in the meantime, a question was raised in the District Court of this district, whether a merchant, under protest, can lawfully sell his immoveable property. This question was made in the case of *Thompson v. Gordon*, and decided in the negative by the District Judge; but his decision was afterwards overruled by this court. 12 La. 263. After this judgment had been rendered, and before its reversal, the defendant, who knew that Hodge was a merchant, under protest at the time of the sale, was advised by his counsel to decline, and accordingly declined, to comply with the terms of the purchase, assigning this decision as the ground of his refusal, and urging upon the plaintiff the propriety of awaiting a final adjudication on the point in the appellate court. The plaintiff refused to wait, and proceeded to the re-sale of the property, under article 2589 of the Civil Code, when it was adjudicated to Andrew Hodge, junr., for \$2250, a sum much less than that brought by the first sale. This difference, together with the costs and expenses incurred, is now claimed as damages. The judge below was of opinion that the decision of the District Court was a sufficient ground to justify a party, under similar circumstances, in refusing to take a bill of sale and pay the price, unless security were tendered to him.

L. Peirce, for the appellant.

Briggs, for the defendant. By the law of France, when Pothier wrote, *the commencement of proceedings in eviction* were necessary to authorize the withholding of the purchase money. 2 Pothier, Vente, 281. Paris ed. of 1827. By the Code Napoleon, the price might be also withheld, until security was given, where the purchaser had *any just reason to fear eviction*. Art. 1653. See 3 Delvincourt, 182. Sirey, 1815, part. 2, p. 182. 2 Trop-long, Vente, § 609, 610. Duranton, Vente, § 351. The provi-

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sions of the Code of 1808, were in conformity to the law in Pothier's time. Ch. 4, art. 15, p. 360. The Code of 1825 has extended the right of the purchaser, to all cases where he has reason to fear eviction. Art. 2535. *Denis v. Claque's Syndics*, 7 Mart. N. S. 93. The decision of the District Court, though not a tribunal of the last resort, afforded just reason to apprehend eviction. Before proceeding to a re-sale, plaintiff should have tendered defendant security. *Pontchartrain Rail Road Company v. Durel*, 6 La. 481. To put the defendant in default, plaintiff should have tendered an act of sale, such as the law required. The omission of the certificate from the Recorder of Mortgages, is fatal. Civ. Code, arts. 1907, 2415, 2586, 2588, 3328. *Stewart v. Paulding*, 6 La. 154.

MORPHY, J. We question much the correctness of the decision below. In a government like ours, every citizen is bound at his peril, to know the law applicable to his case; and no one can be permitted to allege his ignorance of the law. We incline to think that article 2535 does not contemplate a case in which the purchaser's fear of being disquieted arises from his doubts on a naked point of law, but one in which his apprehension results from facts and circumstances connected with matters of law, which may render a title defective; or give to a third person some claim to or on the property he has bought. But, be this as it may, the present case must be decided on a different ground, urged by the appellee's counsel. He contends that plaintiff has not entitled himself to the damages he claims, by putting Moore legally in default, before he proceeded to a re-sale of the property. The evidence shows that the defendant was several times requested verbally and in writing, to call at the office of the notary, Cenas, and sign the deed of sale; and that he was notified that, if he failed so to do, the property would be sold on his account and risk, and that he would be held responsible in damages. The notary testifies that, in February, 1837, at the request of Hodge, he prepared an act of sale, from him to Moore, of the property in question. That having met Moore, he told him that the act was prepared, and that Moore answered that he deferred completing the sale in consequence of the pendency of a suit brought for the purpose of testing the power of a merchant, under protest, to

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make a good title to real property. That the act prepared has remained since then, with other unfinished acts, in a *cahier*, or book kept for such papers. That as he recollects of no mortgage certificate having been, at that time, applied for or obtained, the act is, in its present state, incomplete, and is such a document as he would not allow a purchaser to sign, unless he insisted upon signing it, and directly waived all its informalities, &c. From this testimony, it is clear that the act of sale which it behoved plaintiff to render to the defendant, in order to put him *in mora*, under article 1907 of the Civil Code, and our decision in *Stewart v. Paulding*, 6 La. 153, was not complete. It was not such a conveyance as the purchaser was bound to sign. He was entitled to have an act of sale drawn up in strict conformity with the law, which requires that every notary shall obtain a certificate of the privileges and mortgages existing on the property sold, and shall mention them in the conveyance. Art. 3328. It is true that the same witness adds, that had the parties come before him, at any particular hour, to complete the sale, a certificate could have been procured in a short time. But it might as well be contended that the printed form of a notarial sale, if signed by the vendor, should be considered as a proper title to be tendered, because it could be filled up within a time still shorter than that necessary to procure a certificate, which sometimes requires long researches to be made in the archives of the Recorder of Mortgages. Where a vendor resorts to the highly penal remedy given by article 2589 of the Code, he must be held to the strict requirements of the law. It may be said that the defendant did not specially plead any defect in the title tendered to him, but rested his refusal to carry the sale into effect on the single fact that Hodge was under protest. The putting a debtor in default is, under our law, a condition precedent to the recovery of damages, or the dissolution of a contract. The want of it need not be pleaded in defence, and can at any time be taken advantage of. Civ. Code, art. 1906. 6 Mart. N. S. 229.

Judgment affirmed.

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JOSEPH M. KENNEDY and another v. SAMUEL W. OAKLEY.

A party entitled to the compensation due to the owners of the contiguous lots, from a proprietor of the intermediate ground, who has made use of their walls, may cumulate in one action the debts due for the use of the walls of both owners.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*

This case was submitted, without argument, by *Roselius*, for the plaintiffs, and *T. Sidell*, for the appellant.

MARTIN, J. The petition states, that the plaintiffs are owners of two lots of ground, between which that of the defendant is situated. That the latter, in improving his lot, has made use of the walls of two buildings erected on the respective lots of the petitioners by Sidle and Stewart, under contracts with the petitioners respectively, by which Sidle and Stewart stipulated, and the petitioners respectively promised, that Sidle and Stewart should have the benefit of, and receive whatever sum of money the defendant should become liable to pay, in case, in improving his lot, he should make use of the walls of the buildings so erected on the respective lots of the petitioners. That the defendant has since, in improving his lot, made use of the walls of the buildings so erected, and has become liable to pay for the use of the walls the sum of two thousand five hundred dollars, which the petitioners claim for the use and benefit of Sidle and Stewart.

To this petition the defendant excepted, on the grounds: that it contained two distinct causes of action, absolutely unconnected, which could not be cumulated; that the petitioners can not sue for the use of Sidle and Stewart; and, lastly, that the petition is insufficient, as it does not state the separate and distinct amount of each of the claims, and in not detailing the materials and labor constituting such claims. The exception was overruled. The defendant pleaded the general issue, and prayed for a trial by jury. There was a verdict and judgment for \$1587 81 against him, and he has appealed.

Our attention has been arrested by three bills of exception. The first is to the appointment of experts, which was opposed on the ground that the present is not one of those cases in which the Code makes provision for the appointment of experts, and that

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such an appointment does not take place in cases to be tried by jury. The second is to the trial of the case by the jury, before the experts had made their report. The third bill is to the admission of parol proof of the title of the plaintiffs to their respective lots.

The defendant had refused to appoint an expert, and those appointed by the plaintiffs and the court had been summoned by the plaintiffs, and were in attendance as witnesses. If, as the defendant contended in his first bill, the case was not one in which experts ought to be appointed, he cannot complain of the trial having proceeded without their report. The petitioners appear to have acceded to the wishes of the defendant, by offering the persons who were named as experts, as witnesses in the case. No parol evidence appears to have been admitted of the titles of the petitioners to their respective lots, except perhaps the reference made to the defendant's lot, as lying between those of the petitioners. Their contracts with Sidle and Stewart, one of which is an authentic one, were admitted in evidence without objection. If the plaintiffs were in possession of their respective lots as lessees, or otherwise than as owners, and had the buildings erected thereon, they were entitled to the advantages resulting from the use of the party walls by the defendant, and might transmit that advantage or benefit to the person they employed to build. It does not appear to us that the defendant is entitled to relief on either of these bills.

Sidle and Stewart are the real plaintiffs in the present case. The nominal ones are their assignors only; and the former might cumulate their two claims in the same manner as they might have cumulated claims on two promissory notes, endorsed to them by different payees. This mode of proceeding avoids a multiplicity of actions, and saves costs.

The Parish Court correctly overruled the exception to the petition.

On the merits, we see no objection to the verdict of the jury, or to the judgment of the court.

Judgment affirmed.

THE SECOND MUNICIPALITY OF THE CITY OF NEW ORLEANS V.
JAMES S. MCFARLANE.

Under the ordinance of the Second Municipality of New Orleans, of 12th July, 1836, which declares, that the tax levied on the owners of property for the reimbursement of their portion of the expense of paving, "shall be paid in cash within ninety days after the work is done, or in notes endorsed to the satisfaction of the Committee of Finance, at six, twelve, eighteen, and twenty-four months, bearing interest at the rate of eight per cent a year," interest, at that rate, may be recovered from a property-holder who has neglected to pay, within the ninety days, the amount assessed as his share of the cost of such pavement.

APPEAL from the Commercial Court of New Orleans, *Watts, J.* This was an action by the Second Municipality of New Orleans, to recover one-third of the cost of certain pavement in front of property belonging to the defendant, with interest at eight per cent per annum, from the expiration of ninety days from its completion. By an ordinance of the Municipality, of the 12 July, 1836, (Ordinances, p. 269,) it is provided that, "the amount of the tax for pavement made in front of the lots of individuals shall, in future, be paid in cash, within ninety days after the work is done, or in notes endorsed to the satisfaction of the Committee of Finance, at six, twelve, eighteen, and twenty-four months, bearing interest at the rate of eight per cent per annum." No note had been executed by the defendant. The pavement was laid down under an ordinance of the Municipality, and its cost was proved. The ownership of the property was admitted.

Rawle, for the plaintiffs.

Larue, for the appellant. Interest at eight per cent can only be allowed, where there has been a special contract to grant delay. There was no agreement in this instance.

MARTIN, J. The plaintiffs claim from the defendant the sum of eight hundred and twenty-one dollars and sixty-eight cents, with interest at eight per cent, for his proportion of the expenses of the paving of the street before his property. He resisted the claim on the plea of the general issue, &c. There was a verdict and judgment against him, and he has appealed. The case is before us on a bill of exceptions to the charge of the court, instructing the

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jury, "that the interest at eight per cent could be received as part of the tax." It does not appear to us that the court erred. The Municipality had the undoubted right of calling on the owners of lots, for a contribution to the expenses attending the paving of the streets before their respective property. In doing so, they might insist that those who delayed payment, should pay interest at eight per cent, the delay being a facility which they were not bound to grant; and the owners might have avoided the payment of the stipulated interest, by an earlier payment.

On the merits, we have seen no objection to the verdict or judgment.

Judgment affirmed.

ANTHONY RASCH v. HIS CREDITORS.

A debtor who, being unable to pay all his debts at the moment, transacts with his creditors and obtains from them a delay, is not an insolvent. The concession of a respite is based upon the supposed solvency, or eventual ability of the applicant to pay all his debts. The laws relative to respite are not insolvent laws.

The debtor who applies for a respite does not seek a discharge from his obligations, nor attempt to impein them. The laws of this State relative to respites are not unconstitutional, nor were they repealed or suspended by the act of congress of 19 August, 1841, establishing a uniform system of bankruptcy.

APPEAL from the District Court of the First District, *Buchanan, J.*

Roselius, for the plaintiff.

Chinn, for the appellant.

GARLAND, J. The petitioner presented himself to the inferior court, alleging that he had a sufficiency of property to pay all his debts, if a reasonable time should be allowed him to sell it, on moderate and fair credits; but that, if he should be forced to meet all the engagements for which he was responsible, as they became due, and to sell his property for cash, he would not be able to pay his debts. He prayed that a meeting of his creditors might be called, and that a respite of one, two, and three years, might be granted him. The creditors assembled before a notary public; an

exhibit of the petitioner's affairs was made; and more than three-fourths of the creditors, in number and amount, agreed to the respite, and it was decreed by the judge.

John A. Miller, who is a creditor of the petitioner, opposed the respite, not for any unfairness or fraud in the proceedings, but on the ground that the law of this State in relation to respite, had been repealed or suspended by the enactment by Congress, in the month of August, 1841, of the law in relation to bankruptcy. The objection was overruled; and Miller then prayed that Rasch might be compelled to give bond and security, that his property, or its proceeds should be applied to the payment of the debts. This was given, and Miller has appealed.

The debt was contracted in this State, although Miller is a resident of Mississippi; and the question is reduced to two points: *first*, is the law in relation to respite, as laid down in the Code, an insolvent law, in the proper and legal acceptation of the term; *secondly*, if it be not, is it in any manner repealed or suspended by the bankrupt law of Congress.

Upon the first point, it will be necessary to ascertain the precise meaning of what a respite is, and also what is understood by insolvency. Bouvier, Law Dict. vol. 2, 363, says: "Respite in contracts, in the Civil Law, is an act by which a debtor, who is unable to satisfy his debts at the moment, transacts (*i. e.* compromises) with his creditors, and obtains from them time or delay, for the payment of what he owes them." Our own Code, art. 3051, is in nearly the same words. Other established authorities give the same definition. Pothier treats of it, under the article relating to the effect of contracts; and, against those creditors who refuse to give the time, he says it is to be considered as a question of equity, as it is not just that the rigor of some creditors should prejudice the interest of all. Pothier, Obl. vol. 1, No. 88. The Civil Code, art. 1980, says, that an insolvent is a person whose estate is not sufficient to pay his debts. This is the legal definition, though the word, according to commercial usage, may have a more extended signification. When we look at the evidence before us, we see that the petitioner has property, estimated to exceed his debts by a very large amount. It is urged, that the proceedings to obtain a respite may eventuate in a cession of property and actual insol-

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vency, and that, therefore, in all applications for it, insolvency is to be assumed. This is not so. When the proceedings terminate in that way, it is because the creditors, when they come to examine into the debtor's affairs, find them different from what he has represented them, and find, instead of having sufficient assets to pay the debts eventually, that he is insolvent; and the law so declares him, on their finding. But where a respite is granted, it rests upon the fact of solvency or eventual ability to pay all the debts, and the assent of the creditors establishes the solvency and accords the delay.

Upon the second point, the counsel for Miller relies, with much confidence, upon the cases of *Sturges v. Crowninshield*, (4 Wheaton, 122,) and *Ogden v. Saunders*, (12 Wheaton, 213). In both these cases, the Supreme Court of the United States was much divided in opinion. There was but a majority of one, in the latter case; and Judge Johnson, in his opinion, says that in the former, the court was greatly divided in their views, and, that the judgment partakes as much of a compromise as of a legal adjudication, and must, in its authority, be limited to the terms of the certificate. 12 Wheaton, 272, 273. The law in relation to respite in this State, has no similarity to the acts of the legislature of New York, which were the subjects of consideration in those cases. In *Sturges v. Crowninshield*, the act of the New York legislature of the third of April, 1811, not only liberated the person of the debtor, but discharged him from all liability for any debt previously contracted, on his surrendering his property in the manner prescribed by the act. The Supreme Court said that this was a law impairing the obligation of contracts, within the meaning of the constitution of the United States. The latter case was one, in which the defendant also set up as a defence and bar to the action, a discharge under another insolvent law of the State of New York. The court held that the act had no extra-territorial effect, and could not be pleaded in the courts of the United States, or of another State. In the case before us, the petitioner seeks no discharge from his obligations, nor does he wish to impair their validity. He only says, I cannot pay you now, without ruin to myself, and injury to you and my other creditors; but give me time and all will be paid. We do not see that the granting of so reasonable a demand, is unconstitu-

tional, or prohibited by the act of Congress in relation to bankrupts.

We do not intend to express any opinion, whether, if the creditors of Rasch have acquired under the act of Congress a right to force him into bankruptcy, or shall acquire such a right pending the respite, the proceedings for this respite would defeat the right on the part of the creditors. In such a case, the two laws would, perhaps, be incompatible.

Judgment affirmed.

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APPEAL from the District Court of the First District, *Buchanan*, J.

Chinn, for the appellant.

Roselius, for the defendant.

GARLAND, J. The defendant, being sued on his promissory note, answered that he had obtained a respite ; and that all proceedings against his person and property were arrested by the judgment or order granting it. The exception was sustained, and the suit dismissed. The question seems to us settled, by the opinion given in the case of *Rasch v. His Creditors*, which has been just decided.

Judgment affirmed.

ARTHUR H. WALLACE v. WILLIAM R. GLOVER and another.

The surety in an attachment, though a resident of a different parish, may, under the third section of the act of 20th March, 1839, be proceeded against, summarily, before the court by which the original suit was decided. The object of that section was to authorize the court before which the action was instituted, to determine all questions, principal and incidental, raised in the course of the proceedings, and thus to secure a speedy adjustment of the rights of the plaintiff.

Whenever a question arises out of a bail bond, it is incidental to the main action, and may be tried summarily, without instituting a new suit.

APPEAL from the Commercial Court of New Orleans, *Watts, J. C. M. Jones*, for the plaintiff.

L. Peirce, for the appellant.

SIMON, J. The appellant, Franklin, complains, that a judgment was illegally rendered against him for the amount of an attachment bond, which he and another person subscribed, as the securities of the original defendants. The appellant resides in the parish of West Feliciana; and it is contended by his counsel, that he could not be proceeded against by a rule taken against him in the original suit; but that, having his domicil in another parish, a suit ought to have been commenced against him by petition and citation in his own parish and district.

The record shows that an attachment having been levied on a certain steam boat, as the defendants' property, was released on their executing a bond, with the appellant, and another person also residing out of the jurisdiction of the inferior court, as their securities. Judgment having been rendered against the defendants, the steam boat was sold to satisfy the execution subsequently issued; but owing to certain liens and superior privileges which existed on the property, the proceeds of the sale were exhausted in the satisfaction of those privileges; and, nothing having been made on the writ of execution, it was returned, "no other property found." The plaintiff thereupon took a rule on the securities, to show cause why judgment should not be rendered against them for the whole amount of the original judgment; which rule was made absolute, and final judgment rendered thereon accordingly.

The only question which this case presents, grows out of the

appellant's plea to the jurisdiction of the court *a qua*, which is resisted on the ground, that by the third section of an act of the legislature, entitled "An Act to amend the Code of Practice," approved 20th March, 1839, securities on attachment bonds are to be proceeded against *on motion* and *summarily*. The law relied on by the appellee provides: "That article 259 of the Code of Practice be so amended, that, in case of attachment, when the defendant has given his obligation with security, as by said article provided, and fails to satisfy the judgment rendered against him, the plaintiff may, on the return of the sheriff that no property has been found, &c., obtain judgment against the surety, on said obligation, upon motion, after ten days previous notice to said surety; which motion shall be tried summarily, and without the intervention of a jury," &c. Under article 259, the attachment bond is required to be subscribed by a surety residing within the jurisdiction of the court where the action was brought, which is a rule common to all judicial sureties. Civ. Code, arts. 3011, 3033. Hence it may, perhaps, be inferred, that the appellant, by becoming security, made himself a party to the suit between the original parties, and thereby consented to waive the jurisdiction of his domicil. However this may be, it does not seem to us that any doubt can be entertained as to the intention of the legislature in passing the law of 1839. As the law formerly stood, it was, perhaps, required, that the surety, though residing within the jurisdiction of the court, should be proceeded against by a new action; that is to say, by instituting a new suit by petition and citation. Thus, the creditor was driven to the necessity of an increase of litigation, and subjected to useless delays and expense in the exercise of his legal rights. It is manifest, that in order to remedy the evil, the law of 1839 was adopted for the purpose of bringing in the same suit, and before the same court, all the questions or matters, principal and incidental, which might be raised in the course of the proceedings; so that the plaintiff should be entitled to a speedy adjustment of his rights against the persons who, by becoming securities on the bond, had deprived him of his immediate recourse against the property attached, after obtaining judgment against the principal debtor. It is clear that proceeding *by motion*, and trying the motion *summarily*, excludes the idea

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that a petition and citation are to be served on the securities, and that a new suit is to be instituted to obtain the object of the law-maker ; and it is equally clear, that the law of 1839 would be entirely useless, if it did not deprive such sureties of the right of requiring that they should be proceeded against by a new action. A similar question was brought under our consideration in the case of *Weyman and Thorn v. Cater and Cropp*, (17 La. 530,) in which we held, that "whenever a question arises out of a bail bond, either to enforce its payment, or to destroy the surety's liability, such question is incidental to the main action, and may be tried summarily, without the necessity of instituting a new suit;" and we see no reason to change our former opinion.

But it has been urged, that the law requires that every person shall be sued before the judge having jurisdiction over the place of his domicil (Code of Prac. art. 162) ; and that the law of 1839 was intended only to apply to securities residing within the jurisdiction of the court where the action is brought. The law does not make any such distinction, and is general in its terms. It is true, however, that its provision was adopted in reference to securities on attachment bonds, which securities are required to reside within the jurisdiction of the original suit ; but how can this avail the appellant ? When he signed the bond, did he not bind himself with a full knowledge of the extent of his liability ? Did he not consent to pay the amount of the judgment, if the defendants did not ? Did he not know that, under the law of 1839, he could be proceeded against on motion, and summarily ? Did he not make himself a party to the suit, and submit his rights to the jurisdiction of the court ? This was a right secured by law to the creditor ; and it seems to us that the circumstance, that the plaintiff consented to receive the appellant as one of the sureties on the bond, is not sufficient to deprive him of the right. Indeed, it would be presuming that he knew that the appellant's residence, which is nowhere mentioned in the bond, was out of the jurisdiction of the court, and that he abandoned the privilege absolutely given to him by law. This, in our opinion, would be unreasonable ; for, although every man is presumed to know the law, the plaintiff cannot be presumed to know the residence or domicil of every citizen in the State of Louisiana ; and if this question were

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to be tested by the strength of presumptions, we should rather be disposed to give effect to the presumption that the bond was taken according to law, and that, therefore, the plaintiff was induced to believe that the surety resided within the jurisdiction of the court. We think, however, that, as the law now stands, the appellant's plea to the jurisdiction cannot avail him; that wherever be his residence, his character of surety on the attachment bond made him amenable to the tribunal where the main action was pending; and that his declinatory exception was properly overruled.

Judgment affirmed.

THE COMMISSIONERS FOR THE LIQUIDATION OF THE ATCHAFALAYA RAIL ROAD AND BANKING COMPANY v. HORACE BEAN and others.

To an action by the Commissioners, appointed under the act of 14th March, 1842, for the liquidation of a Bank, for the amount of a due bill, defendants pleaded in compensation a check in their favor, for an equal amount, drawn on the Bank by a depositor. The check was presented for payment on the 10th of March. A writ of sequestration had been issued against the Bank on the preceding day, but the judgment declaring the forfeiture of its charter was rendered on the 11th of the same month, and not signed until the 15th. *Held*, that the debts were extinguished by confusion on the 10th, when defendants, who were debtors for the amount of the due bill, became creditors for that of the check.

A note, though made payable in dimes, may be discharged by a payment in any other legal coin of the United States.

APPEAL from the District Court of the First District, *Buchanan, J.*

Hoffman, for the appellants.

Barker, for the defendants.

The opinion of the court was delivered by

MARTIN, J. The Commissioners of the Atchafalaya Bank are appellants from a judgment, which compels them to allow the amount of a check on the Bank, in compensation of its claim against defendants, on a due bill of equal amount with the check. The due bill bears date the 13th of January, 1842, and is for eight hundred

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and ninety-five dollars, *in dimes, on demand*. There is on the back of it, a credit of ninety-five dollars. The check bears date the 10th of March, 1842, and is for eight hundred dollars. It is in proof that the drawers had money deposited in the Bank for a larger sum, and that the check was presented on the day of its date, and payment refused. At the time that the defendants received the check and presented it for payment, which was on the same day, to wit, on the 10th of March, 1842, there was no judgment of forfeiture. The writ of sequestration against the Bank had been issued and served on the 9th; but the judgment of forfeiture was not given until the 11th of March, and was signed only on the 15th. The defendants being then, to wit, on the 10th of March, creditors of the Bank for eight hundred dollars on the check, and debtors for the same sum on the due bill, the debt was extinguished by confusion; the law itself, without any act of the parties, operating the compensation. Civ. Code, arts. 2203, 2204, 2205, and 2214.

The circumstance of the note being payable in dimes, is perfectly immaterial. It might have been discharged by the payment of eighty eagles, "eight hundred dollars, or eight thousand dimes.

BULLARD, J. I concur fully in the opinion just delivered; and although the case does not, perhaps, call for such an expression of opinion, yet I think it clear that the legislature cannot constitutionally, by any act subsequent to the creation of a debt, interfere to change or disturb the relation between debtor and creditor, or the relative rank of creditors *inter se*; and that two creditors who stood equal originally in the eyes of the law, and had an equal right to be paid, neither having any special lien or privilege over the other, must forever remain equal, notwithstanding any act of the legislature, apparently sanctioning a different doctrine. I conclude that the section of the act of 1842, relative to the taking in payment of the notes of the Bank, was never intended by the legislature to place the bill holder upon a more favorable footing than the depositor, when they occupied originally the same rank as creditors of the Bank.

Judgment affirmed.

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FIRST DISTRICT.

On a rule upon an attorney, under the third section of the act of 27th March, 1823, to show cause why an information should not be filed against him, it is the duty of the judge by whom the rule was granted, to decide as to the sufficiency of the cause shown. The act does not require that the Attorney General should be notified of, or take any part in this preliminary proceeding.

APPLICATION by W. R. B. Wills and T. M. Wadsworth, for a mandamus to the Judge of the District Court of the First District, *Buchanan, J.*

Wills, for the application.

BULLARD, J. The petitioners represent that they have preferred charges against Joel G. Sever, an attorney at law, before the District Court of the First District, in virtue of the act of the 27th of March, 1823, providing for the punishment of contempts of court and other offences committed by attorneys at law.*

* This act provides :

Section 3. If any counsellor or attorney at law shall commit any fraudulent practice in any court in this State, or shall betray the interests confided to him by any client, it shall be lawful for the injured party, or for any two members of the bar, to make a complaint thereof to the District Court of the district in which the party accused is domiciliated, if it be in session, or before the judge of said court, if it be not in session ; the said complaint must be in writing, stating the facts of the case, and must be supported by the oath of the injured party, or his counsel, when he is the complainant, or by the oath of at least one of the members of the bar by whom the complaint shall be made ; the said complaint shall be filed, and if the said court or judge is satisfied that it is duly made, he shall cause the accused party to be summoned to appear at the court-house, there to show cause, in eight days, why an information should not be filed against him ; and if no good cause should be shown, an information shall be filed against him accordingly. The said information must contain a clear statement of the facts complained of, with the necessary circumstances of places and dates, in as full and precise a manner as would be requisite in an ordinary criminal information. Whereupon, a jury shall be convened and impanelled for the trial of the said information, the accused having at least ten days' notice of the trial ; he shall have a right to challenge, peremptorily, five jurors, and such others against whom he can show good cause of challenge. In all other respects the trial shall be conducted as in ordinary cases of trial for misdemeanor, and a new trial may be granted on the application of the accused, if sufficient cause therefor can be shown. And if the accused be found guilty of the charge made against him, the court may either suspend his license, during a certain period, or vacate and annul it altogether, as they shall judge most fit, according to the circumstances of the case.

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That the court issued a rule to show cause, but now refuses to give any final order or decision upon the rule. They pray for a mandamus commanding the Judge of the District Court to make some final order or decree in the premises, or to show cause why he should not.

The judge, in showing cause, recites that part of the act which relates to the instituting of proceedings against delinquent attorneys, which requires that the accused shall be summoned to show cause, in eight days, why an information should not be filed against him; and which goes on to provide, that "if no good cause be shown, an information shall be filed against him accordingly;" and further, that "the trial shall be conducted, as in ordinary cases of trial for misdemeanor." He states, that he caused the Attorney General to be notified of the rule; that evidence was taken before him, as an examining magistrate, under the statute; that after the evidence was closed, it was transmitted to the Attorney General that he might proceed according to law, and under the discretionary powers vested in him as a public prosecutor. It appears that the judge supposed it the duty of the Attorney General to take notice of the cause shown by the accused attorney, and of the evidence against him; while the Attorney General thought it the duty of the court first to decide upon the sufficiency of the cause shown, and either to discharge the rule, or make it absolute.

It is to be regretted that any difference of opinion upon a question so purely technical, should have retarded a prosecution which concerns the honor of the profession, as well as the interests of suitors in our courts. It appears to us that there is but one question in the case, to wit, who is to decide upon the sufficiency of the cause shown why an information should not be filed—whether the judge, or the Attorney General? It is true that the statute does not expressly require the judge to pronounce on the issue made upon the rule to show cause, nor does it make it expressly his duty to order the Attorney General to proceed; but it seems proper that the issue submitted to the judge, should be solved by him judicially, that is to say, that he should decide whether the accused has shown sufficient cause why he should not be prosecuted by information. The statute does not require

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that the Attorney General should have notice, or that he should take a part in these preliminary proceedings; and although we are not prepared to say that the Attorney General might not proceed without such previous decision upon the rule, yet it appears to us more regular, under the statute, that the District Court should first pronounce upon the exculpatory evidence, which the attorney may produce upon the trial of the rule.

Let the mandamus issue.

THE STATE v. THE NEW ORLEANS AND CARROLLTON RAIL ROAD COMPANY.

By the first section of the act of 1 March, 1836, amending the charter of the New Orleans and Carrollton Rail Road Company, it is provided that "the Company shall pay to the State, in ten equal annual instalments from the acceptance of the present act, seventy-five thousand dollars to be employed by the State for the completion of the Attakapas Canal through Lake Verret, whenever such improvements shall have been undertaken and the work actually commenced by the State, or by any Company legally chartered for the purpose." In an action, under this act, by the State, against the Company, who had accepted the act, for the instalments due: *Held*, that the State is entitled to recover, whether the works or improvements have been commenced or not; and that the defendants have nothing to do with the appropriation of the amount they contracted to pay.

A debtor does not, by the indication of another as the person to whom he is to pay, become the debtor of the latter; he continues to be the debtor of his original creditor.

APPEAL from the District Court of the First District, *Buchanan*, J.

Roselius, Attorney General, for the State.

T. Slidell, for the appellants.

SIMON, J. By the sixth section of an act of the legislature, entitled "An act to amend the act to incorporate the New Orleans and Carrollton Rail Road Company," approved on the 1st of April, 1835, it is provided, that, in case said Company do not build a certain rail road, which is the main object of the act of incorporation, in six years, then said corporation shall pay to the State a *bonus* of twenty thousand dollars annually, during the existence

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of its charter. Banking privileges were conferred on the Company, who, under the eleventh section of the act, became obligated to construct and complete the rail road therein described, within six years from the time of its commencement, which was to be within two years from the opening of the books of subscription for the additional capital stock, under the penalty of losing all the extended powers, rights, and privileges granted to the Company by the amendatory act.

On the first of March, 1836, the legislature passed another act, at the request of the Company, amendatory of the act of 1835, by the first section of which it is provided, "that the sixth section of the act hereby amended, and such portion of the eleventh section thereof, as imposes a forfeiture of charter and other penalties, for not commencing the rail road in two years from the period therein defined, and not completing the same within six years from such commencement, are hereby repealed; provided, however, that in lieu of the aforesaid forfeiture and penalty, the Company shall pay to the State in ten equal instalments, from the acceptance of the present act, seventy-five thousand dollars, to be employed by the State for the completion of the Attakapas Canal through Lake Verret, whenever said improvements shall have been undertaken and the work actually commenced by the State, or by any Company legally chartered for that purpose; and the further sum of twenty-five thousand dollars to construct a rail road or causeway between the English Turn and such point opposite to the city of New Orleans, as may be determined by future legislation on this subject; provided, that if, within two years from the passage of this act, no Company be incorporated by the legislature for the construction of said rail road or causeway, the aforesaid sum of twenty-five thousand dollars shall go to the Treasury of the State."

The last recited act was duly accepted by the stockholders of the Company on the 16th of April, 1836; and the present suit, instituted on the 7th of April, 1842, is brought for the purpose of recovering the amount of the several instalments alleged to be due to the State, under the first section of the act of the first of March, 1836.

It is proper to remark, however, that the claim set up by the

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State, is confined to the instalments which may be due on the sum of seventy-five thousand dollars, for the benefit of the Attakapas Canal Company; and that with regard to the twenty-five thousand dollars, relative to the English Turn Rail Road, it is alleged in the petition that it has been paid by the defendants, or that satisfactory arrangements for the payment thereof have been made, with a Company incorporated to construct a road between the English Turn and a point opposite the city of New Orleans.

The defendants first pleaded the general issue, and admitted their corporate capacity; but they further averred that, on the 6th of February, 1842, the legislature passed, with due approval, "An act to revive the charters of the several Banks located in the city of New Orleans, and for other purposes," which was accepted by the New Orleans and Carrollton Rail Road Company, immediately after its passage, and before the institution of this suit, for the purpose of voluntarily entering into liquidation; and that the defendants are now, and, since said acceptance, have been engaged in liquidation. They further deny their liability or indebtedness under the laws of the State, and especially those relating to their corporation, and the Attakapas Canal Company.

There was judgment below in favor of the State for the amount of five instalments, (\$37,500,) from which judgment the defendants have appealed.

Certain admissions contained in the record, show that the amended charter of the Carrollton Bank, approved 1st March, 1836, was accepted by the stockholders on the 16th of April, 1836; that the act of the 5th of February, 1842, was also regularly accepted on the 7th of March, 1842; that the Bank is now engaged in liquidation under said act; and that the defendants made a compromise with the English Turn Company, this last admission, however, not to be understood as conceding that they were legally liable to said Company.

The claim of the State is resisted on three grounds. *First.* That under the first section of the act of 1836, the *bonus* therein mentioned, for the purpose of completing the Attakapas Canal through Lake Verret, cannot be demanded, as no such improvement or work, as was contemplated by the act, has ever been un-

dertaken, or actually commenced by the State, or by any Company legally chartered for that purpose.

Second. That under the 6th section of an act of the legislature, approved on the 20th of March, 1839, entitled "An act to incorporate the subscribers to the Attakapas Canal through Lake Verret," the President of said Company is alone authorized and empowered to claim the said *bonus* to the amount of twenty-five thousand dollars, so soon as the works shall have been commenced; that the State is, therefore, without any right of action; and that neither the President of the Company, nor any other person in his name, or for the benefit of the said Company, has any right of action, as the works therein mentioned have never been commenced.

Third. That under the provisions of the act of the 5th of February, 1842, the defendants, who have voluntarily accepted the said act for the purpose of liquidation, and who are now engaged in liquidation, and were so before the institution of this suit, are relieved from the payment of the *bonus*, claimed by the State in the present action.

I. From the terms of the first section of the law of 1836, above recited, which is the foundation of the claim set up in this suit by the State, it appears to us immaterial for the recovery of the amount sued for, whether the works and improvements therein alluded to, have ever been commenced or not. The *bonus* is to be paid to the State, in ten equal instalments from the acceptance of the act; and it is not, in our opinion, for the defendants to say, that the money proceeding from their obligation, has not been, or cannot be employed for the purposes therein provided. They have nothing to do with the use, or appropriation of the funds which they engaged to pay; for it is clear, from the simple fact of their having accepted the act, that they are to be considered as having impliedly promised to comply with its provisions, and as becoming bound to pay to the State, at the times therein specified, that amount, to be subsequently employed according to the provisions of the law. The appropriation of the money, or the manner in which it is to be used, cannot be viewed as a condition of the payment of the *bonus*; it only shows how it is to be employed after it is paid or collected, and, as its object is entirely foreign to

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the purposes of the act out of which it arises, the defendants have no interest in controlling the use of the funds, and cannot object to paying them to the State, according to the tenor of the obligation contained in their contract, and at the times therein stipulated.

II. The section referred to is in these words : "That so soon as the works shall have been commenced, the President shall be authorized to call upon and receive from the New Orleans and Carrollton Rail Road Company, the sum of twenty-five thousand dollars, in accordance with the provisions of an act, entitled 'An act to incorporate the New Orleans and Carrollton Rail Road Company, and for other purposes,' approved March 1st, 1836, which sum the directors are hereby required to expend in furthering the object contemplated in the charter, and which sum shall be vested in said Canal in behalf of the State of Louisiana." This, in our opinion, contains nothing more than a power or authorization to receive, and is a mere indication made by the State of another person, (the New Orleans and Carrollton Rail Road Company,) who is to pay in its place. It may also be considered as being in the nature of an indication made by a creditor, (the State,) of a person, (the Attakapas Canal Company,) who is to receive for him (Civ. Code, art. 2190); and in such case, Pothier, Obligations, No. 569, considers the act as a *simple mandate*, and says : "*Le débiteur ne devient pas le débiteur de la personne à qui on lui indique de payer ; il demeure toujours le débiteur de l'indiquant.*" The State, therefore, never ceased to be the creditor of the defendants for the whole of the *bonus*, subject to a credit for such part thereof as might have been paid to the President of the Attakapas Canal Company, under the provisions of the act above recited ; but no payment being shown to have ever been made to the President, this ground of defence cannot, in our opinion, prevail.

III. The 7th section of the act referred to, provides "that any Bank, voluntarily or otherwise, entering into liquidation under this act, on its passage, or at any time thereafter, shall be relieved from the payment of any *bonus* to the State or corporations, *not yet due*, or from the further performance of any public work and improvement *not yet completed*, imposed by its charter," &c. This shows

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sufficiently that the legislature never intended to relieve the Banks from the payment of any *bonus* which *was due* at the time of the passage of the act; and as the defendants owed then five of the instalments of the *bonus* sued for, we think the State is entitled to recover them to the amount liquidated by the judgment appealed from.

Judgment affirmed.

JAMES G. BELL v. THE FIREMEN'S INSURANCE COMPANY OF NEW ORLEANS.

Parol evidence is admissible to prove an agreement to sell a vessel, anterior to the date of the written act of sale

One who has agreed to sell a vessel, but has neither delivered it nor received the price, has an insurable interest, the vessel being still at his risk.

To entitle a party to recover on a policy of insurance, he must have had an interest in the thing insured at the time of the loss, as well as at the date of the insurance; and the character of this interest cannot be changed, between the date of the insurance and that of the loss, without the assent of both parties.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

GARLAND, J. This is an action on a policy of insurance, made on the 5th of September, 1839, by the plaintiff, "on account of whom it may concern," lost or not lost, "on the body, engine, tackle, apparel, and other furniture" of the steam boat called the Bayou Sara, without regard to the name of the master by whom she might be commanded, for the space of twelve months, at a premium of ten per cent. The boat was valued at \$20,000, and insurance made for \$9000 by the defendants, and for a like sum by another company. The risks insured against were of the sea, river, and fire, and the boat was to navigate the Mississippi, and its tributaries, with certain limitations as to streams and points on them. There is no clause in the policy requiring the assent of the company to any assignment of it, nor forbidding the plaintiff to sell the boat. On the 6th of September, 1839, the plaintiff, by a notarial act, sold and transferred all his right, title, and interest in the boat, to one Northam, for \$18,000, payable in six, twelve, and

eighteen months, for which notes drawn by him, and endorsed by different individuals, were given *in payment*, and a special mortgage given in the act on the boat, furniture, &c., to secure the payment of the notes. This mortgage was recorded in the proper office, and a memorandum of it endorsed on the enrollment at the Custom House, when Northam took out a coasting license. Northam commenced running the boat to various places out of the State ; but, in a few weeks afterwards, sold one-sixth of her to one Hooper, for the sum of \$3000, payable in three instalments, for which he took his notes, and, in the act of sale, retained a mortgage to secure their payment, in which act, Bell's mortgage is mentioned, and Northam promised to pay it. This latter mortgage was also endorsed on the enrollment of the boat. Northam, as master, and Hooper, as clerk, continued to run the boat until about the last of February, 1840, when, at the instance of various creditors, claiming privileges for supplies, services, repairs, &c., the boat was libelled in the District Court of the United States, and taken into possession by the marshal, who placed a keeper on board, and had her secured at the opposite side of the river from this city, where she remained in charge of the keeper, Hooper being frequently on board, and other persons occasionally. On the 19th of April, 1840, the boat, being then advertised for sale under various executions, was consumed by fire, and totally lost. The plaintiff presented the protest of the keeper of the boat, with his preliminary proof and abandonment, and claimed the amount of the policy, which the defendants refused to pay.

In answer to the petition presented against them, the defendants admitted the policy, but denied their liability, as the plaintiff was neither owner nor part owner of the boat, nor had any insurable interest at the time of the loss, or previously. They further averred, that if the plaintiff had any interest at the time of effecting the policy, the nature and character of it were not fully communicated to them, so as to enable them to charge the proper premium, or to refuse the risk. They further stated, that the boat was intentionally set on fire by some person or persons interested in her ; but of this we see not the slightest evidence, and this defence is abandoned.

The answer then proceeds to state the various seizures of the

boat, the discharge of all the crew, the fact of her being moored on the other side of the river, far from assistance, with but a single person on board to guard and protect her; wherefore defendants allege that she was unseaworthy; and further, that they are not liable for any loss whilst the boat was in the custody of the marshal, for whose acts and conduct they never undertook to answer.

The evidence does not show how the boat got on fire, but it was probably the work of an incendiary. The deputy marshal, and another person, who was sick, were on board at the time. The former testifies that he was awoken by an alarm of fire, from the crew of another steamer lying near. He immediately rushed to the spot, and attempted to extinguish the flames, but did not succeed, as there was gunpowder on board, which soon exploded. He says that if the crew of the neighboring boat had come to his assistance as requested, or if a crew had been on board, the fire could have been arrested.

The record and proceedings from the United States Court were given in evidence; and in it we find a libel filed by the plaintiff, in which he claims the price of the boat from Northam as a debt entitled to the vendor's privilege, and secured by special mortgage, and, therefore, having a preference over the other creditors. In setting forth the character of his claim, the plaintiff states, in so many words, that on the 6th day of September, 1839, he was the owner of the said steam boat, and sold the same, by notarial act, to Northam. This libel is sworn to by the plaintiff. Upon these facts, and some others which will be noticed hereafter, the plaintiff had a judgment; and the defendants have appealed.

The first point to which our attention is directed, is a bill of exceptions. On the trial, the plaintiff asked Hooper, who was a witness, whether the agreement between Bell and Northam to sell the boat was not previous to the act of sale, to which he replied in the affirmative. To this question and answer the defendants objected, on the ground that it was contradicting the act of sale, and that no evidence of what took place before, or after it, ought to be received; but the court admitted it, because it showed a parol agreement before the written contract was executed. According to the doctrine established by this court in *Shields et al. v. Perry*

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et al. (16 La. 466), the judge was correct in admitting the testimony, notwithstanding the objection; but there is a much more formidable one to its effect, which is, that it conflicts with Bell's allegation in his libel, that there was no transfer of title until the 6th of September, 1839.

On the merits, the defendants aver:

First. That the plaintiff had not, at the time the policy was executed, any insurable interest in the steamer Bayou Sara, nor any at the time of the loss.

Second. That if the plaintiff had an insurable interest, he did not properly represent the same to the defendants; that the nature of the interest was material to the risk; and that the policy is, therefore, void.

Third. That there was a deviation.

Fourth. That the boat was unseaworthy.

Upon the first point, we have no doubt that, at the time the policy was executed, on the 5th of September, 1839, the plaintiff had an insurable interest in the boat. He was then the owner, and although he had agreed to sell to Northam, there had not been an execution of the contract. The sale was not complete. Neither the boat, nor the notes, had been delivered. The former was still at the risk of Bell, and had it been destroyed on that day, Northam would not have been bound to pay the notes, they being in the possession of the notary, to be delivered when the sale should be executed before him. He, therefore, could insure on that day. But say the defendants, admitting that he had an interest, as owner, at the time of executing the policy, which Bell, in his libel, says was the fact, (and we cannot see how he can avoid the effect of that statement,) yet he had no insurable interest at the time of the loss, as he had previously sold the boat, without the assent of the underwriters. The principle of law, that there must be an interest at the time of the loss, is as well settled, as that one must exist at the time of making the insurance; and we must now inquire, whether the plaintiff had such an interest, at the time of the loss. As before remarked, there is nothing in the policy of insurance, which prohibits the plaintiff from selling the property and transferring the policy. The clause so common in policies, which makes them void in the event of a sale, without the

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consent of the insurers, is omitted in this ; but this the defendants contend makes no difference, as the nature and extent of the interest is changed, or entirely lost. The plaintiff does not pretend to have had the interest of an owner, since the act of sale, but only that of a mortgagee, or vendor, with a privilege on the boat ; and this the defendants say is not covered by the policy, even if it exist. The question is, can the character of the interest be changed, without the assent of both parties, between the time of effecting the insurance and the loss. We think it cannot. If it were in the power of the party insured to change the character of his interest, he might easily make the contract more onerous to the insurer, though it may not be so in the present instance. The case of *McCarty v. The Commercial Insurance Company*, (17 La. 366,) seems to have settled the question. In that case, the plaintiff, who was the owner of a house, effected an insurance on it for one year. Shortly after he made a donation of it ; and, subsequently, the house was destroyed by fire. He brought a suit on the policy, and we held that the interest which existed and was insured, was entirely divested by the donation, and that the plaintiff could not recover, although he might have a contingent interest, arising from the possibility of the donation being revoked.

Admitting, for the sake of the argument, that the plaintiff has a mortgage, or privilege as vendor, on the boat, to what extent would a policy attach ? Clearly no farther than to secure the payment of the debt. If Northam, or any of the endorsers on the notes, have paid, or shall pay them, it is certain that the plaintiff can have no claim on the defendants ; and if the latter were to pay the amount of the policy, they would be entitled to the amount of the notes. It is not shown that Northam, and his endorsers, were insolvent ; nor that the money cannot be made out of them ; nor that proper diligence has been used to recover it.

The equity of this case is, in our opinion, with the plaintiff ; and there are some circumstances in it, which induce a strong suspicion that the defendants knew that there was an agreement to sell the boat to Northam, and that a contingent interest was really intended to be insured, although Bell's legal title was not technically divested ; but these circumstances are not sufficiently shown to

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justify us in affirming the judgment. We think, however, justice requires us to remand the case for a new trial.

The judgment of the Commercial Court is, therefore, reversed, and the cause remanded for a new trial ; the appellee paying the costs of the appeal.

C. M. Jones and L. Peirce, for the plaintiff.

Micou and Grymes, for the appellants.

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COMPANY.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

GARLAND, J. The policy sued on is the one referred to in the opinion this day delivered in the case of *Bell v. The Firemen's Insurance Company of New Orleans*, just decided, as taken by another Company for \$9000, on the steam boat Bayou Sara, for one year. This policy was executed on the same day as the one in that case, and is the same in every substantial particular. The demand and defence are the same, and the cases were tried together ; and in the inferior court the judgment was in favor of the plaintiff. Our judgment, for the reasons given in the case referred to, is adverse to that of the Commercial Court.

The judgment in favor of the plaintiff is, therefore, annulled and reversed, and the cause remanded for a new trial ; the appellee paying the costs of this appeal.

C. M. Jones and L. Peirce, for the plaintiff.

Maybin and Grymes, for the appellants.

JOHN HUGHES v. THOMAS B. LEE.

Objections to a verdict lose much of their weight, when not made before the court which tried the case originally. A case will be less readily remanded on a question of fact, where a new trial has not been moved for below. An appeal from the judgment of an inferior tribunal, founded on a verdict, should only be taken after the refusal of a new trial.

The verdict of a jury will not be disturbed, unless clearly wrong.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

This case was submitted, without argument, by *I. W. Smith*, for the plaintiff, and *Vason and Farrar*, for the appellant.

SIMON, J. The plaintiff, who is a shipwright, sues to recover the sum of \$1160, for having furnished his blocks and falls, chains, a hulk, &c., for the purpose of raising the steam boat *Campté*, which was sunk in the Mississippi river, above Baton Rouge. He states, also, that the said articles were much damaged; and that on the return of the hulk, he was obliged to moor it, and get the blocks and falls on shore. The account which he files with his petition, is approved by the then master of the boat, who obtained the articles from him, in the absence of the owners, and who used them for the purpose of raising the steamer; and the defendant is sued, as part owner of the steamer, and as being bound, with others, *in solido*, to pay the amount sued for.

The answer sets up: *First*, that the defendant is not liable to the plaintiff for any sum of money whatever. *Second*, that *Gillaud*, who approved the account, was not the master of the boat at the time the articles were furnished, and had no authority to contract debts for the steamer *Campté*; that defendant had a counting house in New Orleans where he resided; and, that in his absence, he had appointed *John E. Hyde*, as the agent of the boat, &c. *Third*, that the amount claimed is unreasonable, and exorbitant, as one-fourth thereof would be a sufficient compensation. *Fourth*, that the articles furnished were useless and unnecessary.

The case was tried by a jury, who, after a full investigation of the facts, returned a verdict for the plaintiff in the sum of \$850; and without attempting to obtain a new trial, judgment having been rendered according to the verdict, the defendant has appealed.

We are called upon to inquire into the correctness of the verdict of the jury, and the appellant appears to have declined the means of obtaining below what he claims now at our hands. We have often said that objections to a verdict lose much of their weight, when not made before the court which tried the cause (9 Mart. 286. 1 Mart. N. S. 717); and that we should remand a cause less readily on a question of fact, if a new trial was not moved for in the lower court. 5 La. 446. In the case of *Carter v. Caldwell*, (15 La. 491,) we said, that judgments of inferior tribunals, founded on verdicts of juries, should never come before us, without showing that an unsuccessful attempt has been made below to obtain a new trial. The law allows this right to the party who believes himself aggrieved, and the appellant should have availed himself of it. Code Pact. art. 558. 17 La. 341.

We have however, considered the merits of the case, and it does not appear to us that any error has been committed. We are unable to say that the evidence does not preponderate in favor of the plaintiff. The inferior judge was satisfied of the correctness of the verdict; its correctness was not put in question below; and as the case stands, we must again hold, that the verdict of a jury, on a question of fact, ought not be disturbed, unless clearly wrong and erroneous.

Judgment affirmed.

EDWARD SMITH v. ROBERT McDOWELL.

The purchaser of a slave, to entitle himself to the benefit of the third section of the act of 2d January, 1834, which provides that one who institutes a redhibitory action on the ground that the slave is a runaway or thief, shall not be bound to prove that such vice existed before the sale, when discovered within two months thereafter, where such slave had not been more than eight months in the State, must show that the slave has not resided therein for eight months preceding the sale.

APPEAL from the District Court of the First District, *Buchanan*, J.

Greiner, for the plaintiff.

C. M. Jones, for the appellant.

Smith v. McDowell.

MARTIN, J. The defendant is appellant from a judgment cancelling the sale of a slave made by him to the plaintiff, and condemning him to the reimbursement of the price, on the ground of the slave being addicted to running away, and not having been, at the time of the sale, more than two months in the State. The sale took place on the 12th of March, 1840; and the slave ran away early in April following, was caught, but ran away again, being the second time within the space of six weeks. No evidence was given of his having run away before the sale to the plaintiff. Defendant relied on the act of the General Assembly of 1834, which provides that the plaintiff, in a redhibitory action, shall not be bound to prove that the habit of running away existed before the date of the sale, whenever said vice shall have been discovered within two months thereafter. This act, however, does not extend to slaves, who have been more than eight months in this State.* The defendant contended that this act ought not to govern the present case, as the slave had been more than eight months in this State before the sale. McClay deposes that he lived with James R. McDowell, in Vicksburg, in the State of Mississippi, who had a plantation on the opposite side of the river, in the State of Louisiana. That James R. McDowell was the owner of a slave named Bob, whom he sent for sale to Robert McDowell, his brother, in New Orleans. That the slave had a wife on his master's plantation, and was a plantation hand. The witness is certain that in the years 1838, 1839, and up to February or March, 1840, the most of the slave's time was spent on the plantation. Sands, a witness for the plaintiff, deposes that, on inquiry by the latter

* The act of 2d January, 1834, provides—

Sect. 3. That the buyer of a slave, who institutes a redhibitory action on the ground that such slave is a runaway or thief, shall not be bound to prove that such vice existed before the date of the sale, whenever said vice shall have been discovered within two months after the sale, and no renunciation of this privilege shall be valid; *provided*, however, that where unusual punishments have been inflicted, this legal presumption in favor of the buyer shall cease; *and provided, also*, that if any redhibitory, bodily or mental, maladies, discover themselves within fifteen days after the sale, they shall be presumed to have existed on the day thereof, any law to the contrary notwithstanding; *and provided, also*, that the provisions of this section shall not apply to slaves who have been more than eight months in this State.

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as to the time that the slave had been in Vicksburg, the defendant said that the slave had been there about four years. The plaintiff was bound to prove that the slave had resided for the eight months preceding the sale in Vicksburg, in the State of Mississippi. This he established by the declaration of the defendant. McClay, a witness for the defendant, deposed that the slave spent most of his time on the plantation, before he was sent to New Orleans for sale. This excludes the idea that he resided exclusively on the plantation. The testimony of Sands appears to have preponderated, in the opinion of the judge, over that of McClay. No other witness has said any thing on this point. We are unable to say that the judge erred.

Judgment affirmed.

MICHEL BERNARD CANTRELLE and others v. ERASME LE GOASTER.

A debt, as between the debtor and creditor, is indivisible, without the consent of both. A debtor cannot be compelled to pay his debt to a number of transferees, among whom it may please the creditor to divide it. C. C. 2107, 2149. The provisions of the twelfth chapter, of the seventh title, of the third book of the Civil Code, arts. 2612-2624, must be understood as applying only to entire debts, rights, or claims.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*

Canon, for the appellants.

Benjamin, for the defendant.

MORPHY, J. The petitioners claim, under an assignment by one François Mazerat to them, \$2102 40, to be taken out of the last payment to be made to said Mazerat, for certain buildings which he bound himself to erect for the defendant. The latter excepted to their right of action, on the ground that a debtor cannot be sued for portions of a debt due by him, and that no partial assignee can bring suit against such debtor. This exception having been sustained by the judge, the plaintiffs have appealed.

The question presented for our decision, can hardly be considered as an open one in this court. In accordance with the sound-

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est principles of law, as well as of reason and equity, we have always held that a debt, as between creditor and debtor, is indivisible without the consent of both; and that, consequently, a debtor cannot be compelled to pay his debt to a number of transferees, among whom it may have suited the interest or convenience of his creditor to divide it. If he have any legal or equitable defence to set up against the claim, he is not to be subjected to the trouble and expense of litigating his rights with a number of persons, and in different courts. The provisions of the Code relied on by the appellee's counsel, and to be found in the chapter which treats of the assignment and transfer of debts, must be understood as applying only to entire debts, rights, and claims; and cannot be made to interfere with another express enactment in the same work, which declares that an obligation, susceptible of division, must be executed between the creditor and the debtor, as though it were indivisible. If a creditor cannot claim the payment of a debt by portions, it is clear that transferees, claiming under him, cannot exercise such a right. *Civ. Code*, arts. 2107, 2149. *King and others v. Havard*, 5 Mart. N. S. 193. *Kelso v. Beaman*, 6 La. 90. *Miller v. Brigot*, 8 La. 535. 6 Toullier, No. 760. 1 Pothier, *Oblig.*, No. 300. Dumoulin, *De Dividuum et Individuum*, 2d Part, Nos. 6, 7.

Judgment affirmed.

MICHEL BERNARD CANTRELLE and others v. JULIEN COLVIS and another.

APPEAL from the Parish Court of New Orleans, *Maurian*, J.

Canon, for the appellants.

Benjamin, for the defendants.

MORPHY, J. This case is not to be distinguished from that of the same plaintiffs against Erasme Le Goaster, just decided. On the grounds therein set forth, the same judgment must be rendered.

Judgment affirmed.

EDWARD GOTTHEIL v. FRANCIS M. FISK.

The decisions of inferior tribunals in matters addressed to their discretion, will not be interfered with, unless in cases of extreme hardship or manifest injustice.

APPEAL from the District Court of the First District, *Buchanan, J.*

Conklin, for the plaintiff.

T. Slidell, for the appellant.

MORPHY, J. The defendant prosecutes this appeal from a decree overruling his motion for a new trial below. The record shows that he was cited and held to bail on the 5th of August, 1841; and that, no answer having been filed in the suit, a judgment by default was taken on the 1st of November following, which was made final on the fifth of the same month. In support of his motion for a new trial, the defendant made oath, that he arrived in this city on the 5th of November, 1841, and was informed that a final judgment had been rendered against him on that day; that he was arrested during the vacation of the court, and the temporary absence of his counsel from the city; that being unacclimated, he was driven away by the epidemic which then raged in New Orleans and endangered his life, without having had an opportunity of giving instructions to his counsel for his defence; that on or about the 23d of August, being then at Natchez, he (defendant) wrote a letter to his counsel, J. P. Benjamin, wherein he gave instructions for his defence, which letter he put on board of a steam boat bound to New Orleans, after obtaining from the clerk of the boat a promise that he would place said letter in the post office at New Orleans; and that said letter never reached his counsel, as he has been informed, &c. On the trial of the rule, the defendant offered to file an additional affidavit, in which he declared that he had a just plea of compensation against the plaintiff's claim, of which the latter was well aware when he obtained his judgment; that he holds a due bill of the plaintiff for \$250, and one for \$100; that he did not mention this fact in his original deposition, nor state it to the counsel who prepared his affidavit, because he did not know that it was necessary to inform him of his defence till after a new trial should be granted, &c.

This last affidavit was rejected by the lower court, on an objection taken to it by the plaintiff's counsel. It came, perhaps, too late, under articles 559 and 561 of the Code of Practice; but should we even allow the defendant the benefit of it, we cannot say that the judge erred in refusing to grant a new trial. The affidavit states no ground which in law entitled him to it. The application was one to the discretion of the inferior court; and in such matters we have always refused to interfere with the decisions of the tribunals of the first instance, unless a case was presented of extreme hardship or manifest injustice. We are unable to perceive any thing of the kind in the present instance. The defendant remained in town more than two weeks after his arrest; and during this interval he was seen several times going into the office of J. P. Benjamin. The latter being absent, he might have employed other counsel. It does not appear that before that time this gentlemen had been his legal adviser; but, on the contrary, it is admitted that during the preceding winter he employed other counsel in a suit in the court below, and had been perfectly satisfied with their management of it. If he was bent upon securing J. P. Benjamin's services, he might have left on his desk a letter, which in all probability would have reached him, as the evidence shows that he was in the city a day or so almost every week during the month of August of that year, and had a younger member of the profession in attendance at his office during his temporary absence. Instead of doing this, the defendant trusted to the chance of a letter, put on board of a steamboat, reaching his counsel. He does not inform us whether he wrote a second letter to him; whether the first had been received; or whether he made any mention in it of the due bills he now wishes to set up as an offset. Upon the whole, we do not think that he made to the judge below, such a showing as should have induced him to open the judgment, especially, when it is considered that his claim, if he has one, is not precluded or destroyed by the judgment, and that he is at liberty to enforce it in due course of law.

Judgment affirmed.

YLDEFONSO GARCIA and another v. THEIR CREDITORS.

All the parties who are interested that the judgment should remain undisturbed, must be made parties to the appeal, or it will be dismissed.

A creditor of an insolvent, in whose favor a judgment has been rendered, on a tableau of distribution, securing him a privilege or mortgage, must be made a party to any appeal, taken by another creditor, or the syndic, for the purpose of reversing such judgment.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*
Labarre, for the appellant.

Canon, contra.

MORPHY, J. The syndic, in this case, filed a tableau of distribution, showing that there was nothing coming to the ordinary creditors, and that those who held privileges or mortgages, would have to contribute to the payment of the costs and charges incident to the settlement of the estate. M. L. De Pontalba, a privileged creditor of the insolvents for house rent, opposed the claims of all the creditors placed on the tableau, and, in particular, that of Victor Debouchel, who was set down as a mortgage creditor, for \$6248 39. Her claim for rent was, on the other hand, opposed by Debouchel, as unfounded. After hearing the parties, the judge below dismissed both oppositions. M. L. De Pontalba has appealed.

The appellant has failed to make Debouchel a party to this appeal. Its dismissal is prayed for on this ground. We have repeatedly held that when a suitor seeks relief, at our hands, against a judgment, he must bring before us all the parties thereto, who might have an interest in its remaining undisturbed. The real party in interest in this controversy is Debouchel, not the syndic. To the latter it must be a matter of indifference who receives the funds he is called upon to distribute, or in what rank the particular creditors are placed on the tableau. If he have any interest at all in a conflict of this kind, it is one adverse to the claim of Debouchel, because the syndic is the representative of the mass of the creditors, who would be entitled to receive a dividend, if this claim were rejected. The law has reserved to the creditors, who are all plaintiffs and all defendants in a *concurso*, the right of

Osborne v. Clayton and another.

watching over their interests, and of protecting themselves in their individual capacities. When, therefore, a judgment has been rendered, securing to one creditor a privilege or mortgage, on a tableau of distribution, he must be made a party to the appeal by which any other creditor, or the syndic, may seek to have such judgment reversed. 7 Mart. N. S. 447. 15 La. 362. 1 Robinson, 274.

Appeal dismissed.

JOHN QUINCY OSBORNE v. ANDREW H. CLAYTON and another.

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No appeal will lie from an order discharging a rule to show cause why an injunction should not be dissolved, on the ground that the petition sets forth no legal cause for issuing it. The order is an interlocutory one, and works no irreparable injury. If erroneous, it may be corrected by appeal from the final judgment.

APPEAL from the Parish Court of New Orleans, *Maurian, J.* The plaintiff having enjoined the execution of a judgment obtained against him by the defendants, a rule was taken on the former to show cause why the injunction should not be dissolved, with damages, on the ground that the petition discloses no legal ground for issuing it. The defendants are appellants from an order discharging the rule. The case was submitted, without argument, by *Benjamin*, for the plaintiff, and *Durant*, for the appellants.

MORPHY, J. The defendants are appellants from a decree overruling a motion to dissolve an injunction, sued out by the plaintiff to stay the execution of a judgment they had obtained against him in the inferior court. This appeal is clearly premature, as the order made on the trial of the motion is an interlocutory, not a final, decree. It works no irreparable injury to the appellants. The error, if any has been committed, can be corrected by appeal from the final judgment in the case. Code Pract., art. 566.

Appeal dismissed.

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JOHN S. WALTON and another v. THEIR CREDITORS.

The fees to which a notary public is entitled for his services being fixed by law, he cannot, under any pretence, demand additional compensation.

APPEAL from the District Court of the First District, *Buchanan, J.*

This case was submitted without argument, by *I. W. Smith*, for the syndics. No counsel appeared for the appellant.

MARTIN, J. Louis T. Caire, the notary in this case, is appellant from a judgment which reduces his claim for professional services, on the opposition of a number of creditors. It is admitted, that on the tableau of distribution the following item is placed, as a privileged claim :—

“ L. T. Caire, notary public, for two meetings of creditors and two certificates of mortgage, \$354 50.”

A witness deposes, that each meeting was adjourned from day to day during three days, and that the office was crowded on each day from nine o'clock A. M. until sun down ; that several days were employed in making the tableau, and that during the interval, creditors often came to inquire of the notary how to state their claims ; and that the charge is not extravagant. The court reduced the charge of the notary, according to the tariff, to \$6575, observing that “ evidence to establish a *quantum meruit*, is entirely misplaced, in relation to those official services for which a tariff is established by law.”

It does not appear to us that the court erred. If the fees allowed to notaries by law, for services rendered by them, be insufficient, they must seek relief by an application to the legislature for a new tariff, or by resigning their offices. Courts of justice cannot countenance any other mode.

Judgment affirmed.

LOUIS LE PAGE v. F. C. PORÉE and another.

Plaintiff having transferred certain shares of bank stock to a third person, for the purpose of enabling the transferee to raise money thereon, defendant caused a *fi. fa.*, which he had obtained against such third person, to be levied on the stock as the property of the latter. The execution was enjoined by plaintiff, who claimed the stock as his own. On a motion to dissolve: *Held*, that by transferring the stock to enable the transferee to raise money thereon, plaintiff made him the apparent owner, and thereby deceived his creditors; and that the injunction was correctly dissolved.

APPEAL from the City Court of New Orleans, *Collins, J.*

Byrne, for the appellant.

Bartlette, for the defendants.

MARTIN, J. The plaintiff, and his surety in an injunction bond, are appellants from a judgment dissolving the injunction on the ground of the insufficiency of the facts on which it was granted. The petition stated that the plaintiff was the owner of a number of bank shares, which he had transferred to Le Page, Jr., in order thereby to enable him to obtain money; and that the defendant Porée, having a judgment against a firm of which Le Page, Jr. was a member, caused the other defendant, the City Marshal, to levy a writ of *fi. fa.*, issued under the judgment, on said bank shares; whereupon, an injunction was obtained to prevent their sale.

It is clear that the injunction was improperly granted. The plaintiff, by transferring his shares to Le Page, Jr., to enable him to raise money thereon, by loan, made him the apparent owner of them, and thereby deceived his creditors.

There was a motion for a new trial on the grounds:

1st. That the judgment ought to have been one of nonsuit only.

2d. That there was no prayer for judgment against the surety.

3d. That notice of trial ought to have been given to the surety, the attorney of the plaintiff being dead.

The court did not err. If an injunction be granted on grounds which do not warrant it, the party against whom it was obtained has a right to demand its dissolution. Gorman, the surety who appeals, did not sign the original bond; but the record shows that

Comstock and another v. Paie and another.

his name was substituted for that of Chalaron, the surety on the original bond, and that the former, Gorman, subscribed a new bond.

Judgment affirmed.

DANIEL COMSTOCK and another v. ANTONIO PAIE and another.

One who had signed a sequestration bond as surety for plaintiffs, but had been released before the trial, another surety having been substituted, is a competent witness for the plaintiffs.

Where the petition prays for a judgment against defendants *in solido*, and one of the latter severs in his answer, but does not plead that the obligation is joint only, and judgment is rendered against defendants *in solido*, it will not be disturbed on appeal.

APPEAL from the District Court of the First District, *Buchanan, J.*

Bartlette, for the appellant, submitted this case without argument. No counsel appeared for the appellees.

BULLARD, J. The appellant, Paie, relies mainly for a reversal of the judgment against him, upon a bill of exceptions taken to the admission of Gyles, as a witness. The objection was, his interest in the case, he having signed the sequestration bond as surety for the plaintiffs. It appears, that, previously to the trial, he had been released, and another surety substituted in his place; nor does the record show that it was too late to permit such a substitution, and thereby remove all objection to the competency of the witness.

It is further objected, that the testimony of a single witness is not sufficient to prove the indebtedness of the appellant. His testimony appears to us to have been fortified by corroborating circumstances, sufficient to justify the verdict.

The appellant's counsel further insists, that the obligation alleged in the petition is a joint one; and that the plaintiffs are entitled to a judgment, at most, for only one-half. To this it is a sufficient answer to say, that the petition claims judgment *in solido*, and the appellant chose to sever in his answer, and did not plead that the obligation was joint, and not *in solido*.

 Liautaud and another v. Baptiste.

Upon the merits, the evidence satisfies us that no error was committed below.

Judgment affirmed.

LOUISE LIAUTAUD and another v. MANON BAPTISTE.

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Illegitimate children, though duly acknowledged, have no claim against the estate of their natural father, but for alimony. C. C. 224, 257, 913.

The rights acquired by children legitimated by the subsequent marriage of their parents, have no effect against gratuitous dispositions, previously made by the latter. The legitimation has no retroactive effect. It operates only from the date of the marriage. C. C. 219, 948, 1556.

A counter-letter, or something equivalent thereto, is the only proof admissible to establish simulation, not fraudulent, between the parties to a contract, or their representatives. Parol evidence is inadmissible.

A legatee, representing an ancestor, and claiming under him, can have no other means of avoiding a contract, than such as the ancestor possessed.

The father of certain natural children, who had made a sale of all his property to a third person, by a subsequent marriage legitimated his children. After the death of the father, the property was sold to a fourth. In an action by the children against the latter, to recover the property on the ground that the sales were simulated, plaintiffs alleged that it was agreed between the deceased and his vendee that, notwithstanding the sale, the former should remain the owner of the property, which should be reconveyed to him when required, or to his children in case of his death, and that the sale was in the nature of a *fidei commissum*, and, as such, prohibited by law. Held, that the interest of the plaintiffs, who were subsequently legitimated, not having existed at the date of the first sale, parol evidence was inadmissible to prove that it was a *fidei commissum*; that the object of the action is to enforce the *fidei commissum* complained of; and that plaintiffs cannot, under the pretext that it was a *fidei commissum*, be allowed to establish the simulation of the sale, and thereby give effect to the very agreement prohibited by law.

The object of the law-maker being to prevent those whom it disables from receiving donations, from secretly enjoying them, all *fidei commissum*, even those in favor of persons capable of receiving, are prohibited. C. C. 1507.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*

SIMON, J. The petitioners allege, that with their brother and sister, they are the only children of Ferdinand Liautaud and of the defendant, who cohabited together, but were not married when their children were born. That by an authentic act, passed the 16th of April, 1823, their father made a *simulated sale* of all his property to

Marcelite Baptiste, who was a natural daughter of the defendant by another father, and that it was understood and agreed between the vendor and vendee, that, *notwithstanding the said sale, said vendor should always remain the owner of the property, which should be reconveyed to him by the vendee, whenever he should require her to do so ; and that, in case of his death, the vendee should convey the said property to said vendor's four children.* They state, that on the 25th of April, 1824, Marcelite Baptiste sold a lot of ground, with the consent and for the account of Ferdinand Liautaud, for the sum of \$4000.

The petitioners further show that, on the 6th of August, 1826, their father and mother contracted marriage, in the presence of their children, and of three witnesses, whereby their said children, who had been previously acknowledged, at different times, and who were again acknowledged in the act of marriage, *were legitimated.* That their father died on the 11th of the same month, without having made any testament ; and that the petitioners, together with their brother and sister, were his only heirs, and, therefore, entitled to his estate, which consisted in the property conveyed by the simulated sale to Marcelite Baptiste, and which was still in the name of the said Marcelite Baptiste, at the time of their father's death, with the exception of the lot of ground above mentioned.

The petition further states, that although it had been *agreed between the vendor and vendee that all the said property should be reconveyed to the vendor, or, after his death, to his children,* and although this was often admitted by said vendee, Marcelite Baptiste, on the 25th of June, 1827, passed a simulated sale of all the property to the defendant. That they (the petitioners) did not remonstrate against the said simulated act, because they continued to occupy portions of the property ; and because their mother always assured them that it was passed in her name for convenience, and that the property should be owned by her and her said children jointly, each of them to own one-fifth thereof.

The petition contains further allegations, setting forth the manner in which some of the property had been disposed of by the defendant, and the reasons why, by an act passed in 1835, the petitioners declared that their father had died without leaving any

property ; and concludes by praying that they may be declared to be the true heirs of one-half of the property left by the deceased, and, as such, the true owners of the one undivided half thereof, and that the defendant may be condemned to pay them one half of the proceeds of the sales of the property by her disposed of, with interest, &c.

The answer first denies all the allegations contained in the petition, and sets up title and ownership to the property in dispute, in the defendant, by a deed, of sale from Marcelite Baptiste, passed on the 25th of June, 1827. The defendant further avers, that she is a third party to, and ignorant of all motives or acts of simulation that may have existed between Ferdinand Liautaud and Marcelite Baptiste ; and that her title to the property in dispute can in no way be affected thereby. She also states that, as the plaintiffs claim to be the legitimated children and heirs of the deceased, they cannot avail themselves of the alleged simulation to destroy his own acts ; but that, on the contrary, they are bound to make good and warrant unto the defendant the title which she holds, &c.

Under these pleadings, the case was tried, without the intervention of a jury ; and, after a full investigation of the proofs of simulation adduced in evidence by the plaintiff, the judge *a quo*, being of opinion that the sale passed on the 16th of April, 1823, and the conveyance from Marcelite Baptiste to the defendant, passed on the 25th of June, 1827, were both simulated, decreed the plaintiffs to be the owners of one-half of the property in dispute, and liquidated the amount due them by the defendant for the one-half of the proceeds of the property sold by said defendant, allowing to one of the plaintiffs, to secure the recovery of his portion, the tacit mortgage given by law to minors on the property of their tutors, said right of mortgage to be exercised on all the property of the defendant. From this judgment, the defendant has appealed.

The evidence satisfactorily establishes all the different acts referred to in the plaintiff's petition, to wit : the deed of sale from Ferdinand Liautaud to Marcelite Baptiste, on the 16th of April, 1823 ; the sale from Marcelite Baptiste to McNeill, passed on the 28th of April, 1824 ; the marriage of Ferdinand Liautaud

with Manon Baptiste, celebrated on the 6th of August, 1826; the death of Liautaud on the 11th of August, 1826; the sale from Marcelite Baptiste to the defendant, executed on the 25th of June, 1827; the declaration made by the plaintiffs before a notary public, on the 29th of May, 1835, that their father left no property at the time of his death; and, lastly, the acts of sale executed by the defendant, by which she disposed of some of the property in dispute, for certain prices or considerations by her received previous to the institution of this suit. ,

Preaux and *L. Janin*, for the plaintiffs. It is objected that the plaintiffs, who are Ferdinand Liautaud's children and heirs, cannot prove by parol the simulation of his sale to Marcelite Baptiste. There would be some force in this objection, if that act were simply a simulated sale, intended to confer an unjust advantage on Marcelite. But it is governed by a different principle. Its real object was a disposition *mortis causa*, or *fidei commissum*—an infraction of a prohibitive law, and therefore a nullity provable by parol by any person in interest.

By proving the simulation of this sale, we at once show its real object, to wit, a trust for the benefit of the plaintiffs. The relation in which the defendant stood towards the plaintiffs, required, on her part, the utmost good faith. Equity is peculiarly conversant with such relations, and it may not be inapt to consult its principles concerning them. Equity will relieve the children from any undue advantage the parent attempts to obtain. 1 Story's Equity, 224. It will interpose in cases, where, but for such relation, it would abstain from granting relief. *Ib.* 304-6. In such cases, where, from confidence, the contract has not been reduced to writing, the statute of frauds will not be permitted to be made an instrument of fraud. *Ib.* 323-4. Similar trusts have been allowed to be proved by parol. *Gresley's Equity Evidence*, 208. 2 Story's Equity, 444. So where it was agreed that the contract should be put in writing (*Fonblanque's Equity*, 150, 153); or where there was a part performance, for instance, where the real vendee was let into possession. 1 Maddock's Chancery, 376, 381. *Boyd v. McLean*, 1 Johnson's Chancery Rep. 582.

Here Liautaud remained in possession up to the time of his death, and the plaintiffs retained the possession, and received the

rents of a portion of the property until within a month or two before the institution of this suit, when the defendant expelled them. Liautaud appeared in the act of sale to McNeill, and received the price. The defendant promised to execute a writing.

In France, parol evidence has been let in between the original parties, under circumstances less favorable. Dalloz, Dictionnaire Alfab. vol. 4, *verbo* Preuve Testimoniale, No. 103, p. 50, Nos. 280-3. Jurisprudence du XIX. Siècle, Année 1830, vol. 1, p. 70; Année 1831, vol. 2, p. 303 bis, 573; Année 1832, vol. 1, p. 509.

A circumstance of peculiar force militates in favor of the plaintiffs. Three of the defendant's four children were minors when Liautaud died, and the defendant became their tutrix. She was bound to claim from Marcelite the conveyance to the children agreed on. In case of Marcelite's refusal she ought to have sued her, put her on oath, and have brought against her the abundant evidence which at that time no doubt existed. The defendant would be responsible to her children if she had simply neglected her duty. But in this case there was no reluctance on the part of Marcelite, who was anxious to be relieved from the responsibility, and ready to do whatever the defendant required. By false promises she induced her confiding daughter to pass a sale to herself. There was no fraud on the part of Marcelite. The defendant was alone guilty of it.

The tutrix cannot screen herself under the technical rules applicable to parol evidence. She is charged with fraud, and even if a third person could object to parol testimony, she, as tutrix, cannot.

Continuing to hold out the same promises, the defendant induced three of her children to pass the act of May 29, 1835. This act is, in reality, a compromise; and as it was preceded by no account of the tutorship, is not binding upon the plaintiff Louis Liautaud. Civ. Code, art. 335. The plaintiff Louise Liautaud, was no party to it.

The agreement between Ferdinand Liautaud and Marcelite was a *fidei commissum*. *Fidei commissa* are prohibited from motives of public policy. Civ. Code, art. 1507. Like every infraction of a law *d'ordre public*, they may be proved by parol.

Chardon, De la Fraude, vol. 3, p. 148. 8 Duranton, No. 570. 2 Chardon, 39. This proof is open to the children of the *fidei committens*, from motives of public policy. 3 Chardon, 148. 2 Vazeille, Résumé, 232. If it were denied to them, the object of the law would be defeated, for a person without an interest could not attack the *fidei commissum*. Not only is parol testimony admissible, but strong presumptions will suffice. 2 Chardon, 39. 3 Chardon, 148. See also, *Tournoir v. Tournoir et al.*, 12 La. 19. *Fidei commissa* are prohibited by our law, even in favor of persons capable of receiving in another form; and such *fidei commissa* may be proved, by parol, by the heirs of the donor.

By the Roman law, legacies and particular *fidei commissa* were subject to the same rules.

On appelle fideicommiss particulier une disposition par laquelle l'héritier, ou un légataire est prié de rendre ou de donner une chose à une tierce personne. Domat, Liv. 4. tit. 2. Des Leg. sect. 1.

Et fidei commissum et mortis causa donatio appellatione legati continentur. L. 87. De Leg. 3.

For the true appreciation of the French authorities, it ought to be observed, that the French Code does not prohibit *fidei commissa* in favor of persons capable of receiving; ours prohibits all kinds. Art. 886 of the French Code, says: "*Les substitutions sont prohibées.*" Art. 1507 of our Code, (the same as art. 40, p. 217 of the Code of 1608,) says: "*Substitutions and fidei commissa are, and remain prohibited.*" These are the corresponding articles of our own and the French Code. In no part of the French Code are *fidei commissa, eo termino*, prohibited. But art. 911 of the French Code, which is art. 1478 of our Code, declares the nullity of dispositions made in favor of persons incapable of receiving, in whatever form, and under whatever disguise they may be made. These articles, therefore, prohibit *fidei commissa* in favor of incapable persons, the only kind proscribed by the French law. Our law, on the contrary, condemns all kinds of *fidei commissa*, for the reasons so forcibly stated in 12 La. 23. In the French writers we can, therefore, only expect to find authorities concerning *fidei commissa* in favor of incapable persons; but it is obvious, that so far as the admissibility of parol evidence

is concerned, they apply to cases arising under our law, where the *fidei commissum* was intended for the benefit of a person who might legally have received a legacy in another form.

There is no point more clearly established in French jurisprudence, than that concealed, tacit *fidei commissa* may be proved by parol. See, besides, the authorities already quoted, Merlin, Répertoire, *verbo* Preuve, sect. 2, § 3, art. 1, No. 8, *in fine*. (Vol. 24, p. 449 of the Brusselse dition.) Œuvres de Despeisses, vol. 2, p. 584, No. 5. Desquiron, Traité de la Preuve par Témoins, p. 147, No. 286 ; p. 148, No. 287.

That the heirs of a donor can contest the donation, if it be not made in due form of law—that the heirs of a testator may have a testament set aside, if not made in proper form, are positions too well established to require authorities in their support. By art. 1563 of the Civil Code, no disposition, *mortis causa*, shall be made, otherwise than by last will or testament. If, therefore, a disposition *mortis causa*, be made in the form, and under the disguise of an onerous contract, it is null and void. Where an estate is not insolvent, none but the heirs can question the validity of a testamentary disposition. To deny to the heirs the right of proving, by parol, that an apparently onerous contract is a disguised disposition *mortis causa*, is to declare that any person may dispose of his property, *mortis causa*, in favor of whomsoever he pleases, whether the object of his bounty be incapable or not, provided he adopt the form of an onerous contract. What the consequences of such a principle would be, the court will divine without comment.

The provision of art. 2256 of the Civil Code, which prohibits the reception of parol evidence against and beyond the contents of acts, applies to *contracts* only in cases where it would have been in the power of the party to procure written evidence, such as counter-letters, and not to testaments, or dispositions, which, under whatever form they may be disguised, are really dispositions *mortis causa*. 9 Toullier, p. 232, No. 137.

But it will be said that the plaintiffs were legitimated only five days before Liautaud's death, and that they had the rights of legitimate children only from that period, whereas the sale to Marcelite was passed several years before.

The obvious answer to this is, that the plaintiffs being acknowledged natural children by the act of July 7, 1818, had a right to claim alimony from their father's estate (Civ. Code, art. 257); that if they had never been legitimated, they would still be the only heirs left by Liautaud at the time of his death; and that, therefore, they had the right of contesting the illegal disposition, *mortis causa*, by which that estate was withdrawn from them.

As they were Liautaud's heirs at the time of his death, even had they become such only by the legitimation, they had a right to his estate as it then was. Simulated dispositions, such as a sale to conceal property from creditors, could not be impugned, by parol evidence, by heirs thus situated; but it is far different in regard to dispositions *mortis causa*. If the simulated act be proved to have been a disposition, *mortis causa*, it is the same as if it had been made in the express terms of a will; and the capacity to take under a disposition *mortis causa*, or to contest it, is determined by the law and the state of things existing at the time of the testator's death. As to these, the heir is not considered in law as the same person as his ancestor. For he may set aside a testament for defects of form, although he should be a legatee. The plaintiffs' case is precisely similar. The heir has a right to inquire by what acts, *mortis causa*, the property, which otherwise would have descended to him, is diverted into a different channel; and if these acts are not in compliance with the strict requirements of the law, he may set them aside; these requirements being eminently *d'ordre public*. Hence it also follows, that he can prove their simulated character.

The prescription of five years (art. 3507,) relied on, applies only to the parties to an act. The plaintiffs were not parties to Marcelite's sale to the defendant. Besides the plaintiffs were in possession; the defendant, until lately, always professing her willingness to carry out Liautaud's and Marcelite's intention. There was bad faith on her part; and prescription could commence only from the time when she first claimed an exclusive title and right of ownership.

Soulé, for the appellant. The parties to an act cannot allege simulation, unless they can show a counter-letter, where the

act alleged to be simulated is one of those which must be reduced to writing.

In all cases, except those where there is a counter-letter, simulation can only be invoked by third persons. Merlin, Repert. vol. 31, p. 252, 253. Civ. Code, art. 2256. Toullier, vol. 9, p. 223, 237. Duranton, vol. 13, p. 373. Journal des Audiences, Supp. vol. 8, p. 65. Ib. vol. 9, p. 59.

The act assailed on the ground of simulation, was executed before the plaintiffs were legitimated by the marriage of their father and mother; and they cannot sue to annul acts done by their father previous to their legitimation. Journal des Aud. vol. 9, p. 177.

Were the testimony adduced in the case admissible, it would not conclusively prove the alleged simulation.

The appellant pleads the prescription of five years against the action brought by the appellees. Civ. Code, art. 3507.

SIMON, J. Without being necessary to inquire into the facts of simulation established by the parol evidence found in the record, which parol evidence comes up subject to all legal exceptions, (reserved by the defendant's counsel, in the same manner as if he had taken a bill of exceptions,) and will become the subject of a farther inquiry as to its admissibility, the first question which presents itself to our consideration, is, what were the legal rights of the plaintiffs, as children and heirs of Ferdinand Liautaud, at the time of the sale of the property in dispute to Marcelite Baptiste.

It cannot be controverted that, in April, 1823, Ferdinand Liautaud, had no legitimate children; and that the plaintiffs, and their brother and sister, though duly acknowledged by an act passed in 1818, had no other rights to exercise against the estate of their natural father, than those of illegitimate children, who, by law, are only entitled to claim alimony. Civ. Code, arts. 224, 257, 913. They were not the forced heirs of Liautaud, and could raise no pretensions to any part of his estate. But they were legitimated by the subsequent marriage of their natural father with the defendant; and the question occurs, what rights have they acquired by this subsequent legitimation? By art. 219 of the Civil Code, children legitimated by a subsequent marriage, have the same rights, as if they were born during marriage—in the French text, "*nés de ce mar-*

iage." If this article stood alone, it might, perhaps, be said, with some force, particularly under the English and governing text of our law, that the rights acquired by legitimated children, have a retroactive effect, revert back to the time of their conception; and that, therefore, their right to inherit, or to claim their legitimate portion as forced heirs, has effect against the gratuitous dispositions made by their parents since the conception of their children, though before their legitimation. But on referring to art. 948, we see clearly that the law has limited the right of legitimated children to *their taking only the successions which are opened since the marriage of their father and mother*; and under art. 1556, *all donations inter vivos, are to be considered as revoked up to the disposable portion by the legitimation of a natural child by a subsequent marriage, if the child be born since the donation*. Now, it cannot be pretended that the plaintiffs were born since April, 1823; and, if the act of sale attacked in this suit as simulated, instead of being, as alleged, a fictitious sale, were a donation *inter vivos*, it is clear that the plaintiffs could not attack it, nor claim its revocation. The gratuitous title given by their father would stand and have its legal force and effect, notwithstanding the subsequent rights acquired by the children, by virtue of their legitimation. Toullier, v. 2, No. 929, upon an article of the Code Napoleon similar to ours, says: "*Il faut observer que l'effet de la légitimation n'est point rétroactif, et qu'elle ne remonte pas à la naissance de l'enfant. La légitimation n'opère son effet que du moment où existe le mariage qui l'a produite. Tout ce qui s'est passé dans la famille du père ou de la mère avant leur mariage est étranger aux enfans légitimés par ce mariage*." This doctrine is also entertained by Merlin, *verbo* Legitimation, sect. 2, § 3, art. 4, who gives his opinion on the art. 960 of the Code Napoleon, corresponding with the 1556th of our Code. By Grenier, *Donations*, vol. 1, No. 193. By Favard de Langlade, *verbo* Legitimation, § 3. By Dalloz, *verbo* Filiation, chap. 3, sect. 1, § 9, who says: "*Leur âge, comme légitimes, ne compte que du jour de la légitimation; tous droits acquis antérieurement sont bien acquis*." See also, *Journal des Audiences*, v. 8, Supp. p. 65. *Ib.* v. 9, p. 177. It results, therefore, from the provisions of our law, as well as from the weight of the authorities above quoted, that

Liautaud was at liberty to dispose of his property as he pleased, in April, 1823; that the sale made then to Marcelite Baptiste, considered either as a sale, or as a disguised donation, or as a simulated conveyance, or in any other manner, cannot be disturbed by persons who had then no legal right to claim against, or to exercise over the property; and that if Marcelite Baptiste had died before disposing of the property, it would have passed to her heirs, without the plaintiffs having any legal capacity to claim or recover any part thereof.

But, instead of keeping the property so as to let it go to her legal heirs, Marcelite Baptiste conveyed it to the defendant; and hence, it has been strenuously contended, that this conveyance, also simulated, was passed in execution of her previous agreement with the vendor, and for the purpose of transferring the property to the plaintiffs and the other children, through their mother. This sale was passed after the legitimization, and if the object thereof, were really such as represented, it would have been more simple to execute the sale directly in favor of the children, to which there was then no possible impediment. However it may be, Marcelite Baptiste gave an absolute title to the defendant, who acted for herself and in her own name. It is clear, therefore, that the plaintiffs possessed no right at the time that the first sale was executed by Liautaud to Marcelite Baptiste; that they only acquired the rights of legitimate children in August, 1826; and it is obvious that the only title they can set up now, is as heirs of the deceased, since the latter period. They have nothing to do with what took place previously; they cannot disturb the acts of their father, and must take his succession in the situation in which they found it at the time of his death, without being able to attack any disposition of his property made previous to their legitimization. In other words, *they merely represent the deceased*, and are only entitled to exercise his rights. If so, how can they be admitted to pretend that the sale from Marcelite Baptiste to the defendant, is the consequence of that from the deceased to Marcelite? If the simulation alleged against the first sale, continued in the second, does this last circumstance give the plaintiffs a greater or better right to claim the property from the defendant, than they would have had against Marcelite Baptiste or her heirs, if she had not

parted with her title to it, and could Liautaud himself have set up any claim to the property as against Marcelite Baptiste, or the defendant, who acquired her rights, on the ground of simulation?

On this part of the case it is proper to remark, that this action is based on the allegations, that the two sales complained of are *fictitious and simulated*. The petition contains no allegation of fraud or error; and we are called upon to give effect to a pretended agreement, said to have existed between the parties, by which it was understood that, *notwithstanding the sale, the vendor should always remain the owner of the property, which should be reconveyed to him by the vendee, whenever he should require Marcelite Baptiste to do so, and that in case of his death, it should be reconveyed to his children*. There is no rule of evidence better known and settled in our jurisprudence, than this, that the fact of simulation admits of no other proof between the parties to a contract, or their representatives, than a counter-letter, or something equivalent thereto. In 2 Mart. N. S. 14, this court said, that where a legatee, representing the ancestor, claims under and through him, he has no other means of avoiding the contract but those which the ancestor possessed; and the principles of law recognized in the case of *Badon v. Badon*, 4 La. 169, are fully applicable to the present case. This has been the general and uniform course of our jurisprudence (6 Mart. N. S. 206. 8 Ib. N. S. 448. 3 La. 4. 4 Ib. 351); and in the case of *Delahoussaye v. Davis' Heirs*, &c. 19 La. 412, we again recognized the rule, that a simulation, not fraudulent, cannot be proved by parol, as between the parties. Civ. Code, art. 2256. Merlin, *verbo* Simulation. Duranton, v. 13, Nos. 338, 339. Toullier, vol. 9, § 233, 234, 247. It is clear, therefore, that Liautaud himself would have vainly attempted to prove that his sale to Marcelite Baptiste was feigned and simulated, in any other manner than by producing a counter-letter; and that the parol evidence introduced in this case, would have been rejected. If so, surely, the appellees, who represent him, and claim through and under him, cannot be allowed to avail themselves of it.

Under this view of the question, we must come to the conclusion that the appellees were precluded from attacking the contracts complained of on the score of simulation, unless they were

ready to establish it by written evidence ; and that the parol evidence excepted to by the appellant's counsel, was improperly and illegally admitted.

The position, however, assumed by the appellees' counsel, that the contracts complained of were in the nature of *fidei commissa*, and prohibited by our law, has been insisted on with a good deal of plausibility ; and we must confess that we were, at the first blush, impressed with the idea that it was the stronghold of their case. Further reflection, however, has enabled us to discover the fallacy of the argument, which consists in maintaining that, the agreement between the deceased and Marcelite Baptiste, being a *fidei commissum*, prohibited by law, this infraction of the law can be proved by parol. This would perhaps be true, if the interest of the appellees, adverse to the *fidei commissum*, had existed at the time of the act ; and if the alleged disguised illegal disposition, having been resorted to, to defeat these acquired rights, stood in conflict with the exercise of them. But, as we have already said, their interest did not then exist ; and it seems to us that they cannot, under the pretence that the contract by them attacked, was executed to cover a *fidei commissum*, be allowed to establish its simulation, and thereby give effect to the very act which the law has prohibited. And indeed, do not the appellees seek to enforce, in this action, the very *fidei commissum* by them complained of ? Is not the true object of this suit, under the allegations of the petition, to give effect to the agreement pretended to have existed in their favor between the deceased and Marcelite Baptiste, and to have been subsequently carried into execution by the latter, by the sale of the property in dispute to the defendant ; and would not the judgment, which we are called upon to render, be, in effect, declaratory of the appellees' right to recover under the very agreement by them treated as a *fidei commissum* ? Surely it would ; and we are constrained to declare, that they cannot be entitled to reap the fruits of a flagrant violation of the law, on the part of the person whom they represent, and under whom, and in whose right, they claim. Under the application of the maxim, "*De turpi causa non oritur actio*," the law gives them no action to enforce it. In the case of *Tournoir v. Tournoir et al.*, 12 La. 23, relied on by the appellees' counsel, this court held, that the object of the law (Civ. Code, art.

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1507,) being to prevent the persons, whom it disables from receiving donations, from secretly enjoying them, all *fidei commissa*, even those in favor of persons capable of receiving, are prohibited. This doctrine is certainly correct, but the case quoted is not analogous to the present. There, the proof was adduced by the party whose interest was adverse to the existence of the *fidei commissum*; and was not introduced for the purpose of giving effect to the illegal disposition of the testator, but in order to defeat its object. Here, on the contrary, were we to admit the evidence offered to prove the alleged simulation, the consequence would be, that, if the fact were sufficiently made out, the appellees would be allowed to recover the property which was the object of the reprobated agreement by them called a *fidei commissum*. Such a doctrine cannot be sanctioned by this court.

Upon the whole, we think the lower judge erred, in receiving the parol evidence introduced by the plaintiffs to prove the fact of simulation, and in giving effect to the agreement declared upon in their petition.

It is, therefore ordered, that the judgment of the Parish Court be reversed; and that ours be for the defendant, with costs in both courts.

ISAAC MARKS and others v. THE LOUISIANA STATE MARINE AND FIRE INSURANCE COMPANY.

Plaintiffs, owners of a policy of insurance on freight, finding their port of destination in a state of blockade, abandoned the voyage, and returned without insisting upon receiving their freight. There was a provision in the policy that, "the assured shall not abandon in consequence of the port of destination being blockaded, but the vessel shall, in such case, have liberty to proceed to another port not blockaded, and there end the voyage, or wait a reasonable time for the blockade of the original port of destination to be raised." In an action for the amount of the policy: *Held*, that this clause did not authorize the owners to break up the voyage; and implied nothing more than a consent, on the part of the insurers, to take the risk of proceeding to another port, or of waiting a reasonable time for the blockade to be raised.

APPEAL from the Parish Court of New Orleans, *Maurian, J. BULLARD, J.* This is an action, upon a policy of insurance, on

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freight to be earned by the schooner *Dolphin*, in a voyage from New Orleans to Matamoras. The plaintiffs allege that the schooner sailed about the 23d of April, 1838, and proceeded with her cargo to Matamoras, where she anchored about the 28th, but was prevented, by a French national brig, from landing her cargo, and compelled to return to New Orleans about the 9th of May. They state that the schooner waited in the port of New Orleans a reasonable time for the raising of the blockade, but that the same still continued at the inception of this suit.

The defendants answer, that, even admitting the schooner was prevented from landing her cargo at Matamoras, by a French armed brig, they cannot be liable, because that port was blockaded by a French naval force, and by the terms of the policy, they (the defendants) are not responsible for any loss or damage occasioned by such an event.

The clause in the policy upon which the defendants rely, is as follows: "The assured shall not abandon in consequence of the port of destination being blockaded, but the vessel shall, in such case, have liberty to proceed to another port not blockaded, and there end the voyage, or wait a reasonable time for the blockade of the original port of destination to be raised."

The facts disclosed on the trial are, substantially, as alleged in the petition. The ports of Mexico on the Gulf were blockaded at the time by an adequate French force, and the schooner was boarded off Matamoras, and forbidden to enter. She thereupon returned to New Orleans. About ten days after her arrival, the cargo was landed, and on the 16th of June, 1838, this action was instituted.

Durell, for the plaintiffs.

L. Janin, for the appellants. It is evident that the Parish Court, when rendering judgment in this case, had either forgotten the clause in the policy which excepts a blockade from the risks insured against, or that its attention had never been drawn to the clause.

The case of *Vigers v. The Ocean Insurance Company*, 12 La. 362, is conclusive on this case. The facts of both cases are, in a great measure, similar. There the decision was against the Company, under that clause of the policy, by which "arrests,

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restraints, and detainments of all kings, princes, or people of what nation soever," &c., are insured against. The word "blockade" was not found in any part of the policy; but the court held that a blockade was a "restraint." In this case, on the contrary, we have a positive and clear exception of blockades. "The assured shall not abandon in consequence of the port of destination being blockaded, but the vessel shall, in that case, have the liberty to proceed to another port not blockaded, and there end the voyage, or wait a reasonable time for the blockade of the original port to be raised."

Mr. Eustis, the plaintiff's counsel in the case of *Vigers v. The Ocean Insurance Company*, acknowledges in his argument, (12 La. 365,) that if this exception, which is in the policies of several other Insurance Companies of this city, had been in that of the Ocean Insurance Company, Vigers could not have recovered.

BULLARD, J. The undertaking on the part of the defendants was, that the schooner should earn her freight on a voyage to Matamoras, notwithstanding the ordinary perils of the sea. They did not take the risk of a blockade of the port of destination; but, in that event, the vessel was at liberty to deviate from her direct course, enter another port, and wait a reasonable time for the raising of the blockade. It follows that, if, in consequence of the blockade, the vessel had steered for another port to wait, and had been lost, the underwriters would have been liable, notwithstanding the deviation. But it cannot be fairly concluded from this clause in the policy, that the owners were at liberty to break up the voyage, and give up the cargo to the shippers, from an apprehension that it would be injured by hot weather. They might have insisted upon the payment of their freight, or have waited for the raising of the blockade; for, however deteriorated the cargo may have been on its arrival at the port of destination, the vessel would have earned her freight according to the undertaking of the defendants. The plaintiffs voluntarily put an end to the voyage, without insisting upon receiving their freight.

If, instead of being on the freight, the insurance had been on the vessel, or the cargo itself, it appears to us clear that the assured would not have had a right, under the circumstances presented by this case, to abandon as for a total loss, and to recover of

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the underwriters. The absence of a right to abandon on account of a blockade, excludes the right to recover any loss occasioned by such an event. By permitting the vessel, in such a case, to proceed to a different port, nothing more is implied than a consent, on the part of the insurers, to take the risk of proceeding to another port, and during the detention, for a reasonable time, until the blockade may be raised. If the plaintiffs recover in this case, it can only be on the ground, that the blockade put an end to the voyage; and such liability cannot attach, unless a blockade was one of the perils insured against, which is plainly not the case.

The judgment of the Parish Court is, therefore, avoided and reversed; and ours is for the defendants, with the costs in both courts.

FREEMAN FISHER and another v. THOMAS B. VOSE.

The object of the act of Congress of the 19th August, 1841, establishing a uniform system of bankruptcy, was, while it released the debtor, to distribute the proceeds of his property as equitably as possible among his creditors, due regard being had to the nature of the different contracts and liens affecting it.

Where a party to a suit pending before a State court, applies to be declared a bankrupt under the act of Congress of 19th August, 1841, the proceedings must be suspended, for a reasonable time, to enable him to file the decree, when the assignee must be made a party. As soon as the decree in bankruptcy is pronounced, the bankrupt, in relation to all actions for and against him except such as the statute prescribes, is legally dead, and can only be represented by the assignee.

Where plaintiff in an action commenced by attachment, has obtained a judgment before defendant's application to be declared a bankrupt under the act of Congress of 1841, he will be entitled to a preference on the property attached. *Aliter*, where defendant's application was made before judgment. In the last case, no privilege is acquired.

APPEAL from the District Court of the First District, *Buchanan*, J.

Winthrop, for the plaintiffs.

Halsey, for the appellant.

GARLAND, J. This action was commenced by an attachment, founded on two bills of exchange, amounting to \$1424 20. Two garnishees were cited on the 8th of February, 1842, the day of

instituting the suit. The plaintiffs and defendant are residents of Boston, in the State of Massachusetts. On the 14th of February, 1842, the defendant filed his petition in the District Court of the United States, sitting in Boston, praying to be declared a bankrupt; and, on the 18th of March, the counsel appointed to represent him, filed an exception, stating this fact, and concluded by pleading the surrender by the defendant of his property and his proceedings to be declared a bankrupt, as a bar to this suit, and asking for its dismissal. The fact of the proceedings in bankruptcy, was admitted at the trial. The court overruled the exception, and gave a judgment for the plaintiffs, from which the defendant has appealed.

The question is, whether the commencement of proceedings to obtain the benefit of the act of Congress, approved August 19th, 1841, establishing a general bankrupt system throughout the United States, operates as a bar to proceedings against the petitioner by attachment.

The Constitution of the United States authorized Congress, to pass uniform laws on the subject of bankruptcy. That power has been exercised, and the act mentioned is the result. The third section of the act, vests all the property of the bankrupt, by mere operation of law, in the assignee appointed by the court, with as ample a right as the bankrupt himself had or could have, and proceeds to say, that "all suits in law or in equity then pending, in which the bankrupt is a party, may be prosecuted and defended by such assignee to their final conclusion, in the same way, and with the same effect, as they might have been by such bankrupt." Other sections of the law point out the duties of the commissioners as to receiving evidence of the claims against the bankrupt, and of the assignee in disposing of the property and distributing its proceeds. They all go to show that the object of the law was, whilst it released the debtor, to distribute the proceeds of the property surrendered, as equitably and fairly as possible among the creditors, due regard being had to the nature of the different contracts and liens affecting it. This just and legal right would be entirely defeated, if it were permitted to the creditors of a bankrupt to pursue his debtors and their property, wherever they,

or it, may be, and obtain a preference by attaching and prosecuting suits, without notice to the assignee or any one interested.

As soon as the decree in bankruptcy is pronounced, the bankrupt, in relation to all actions for or against him, except such as the statute prescribes, is legally dead, and can only be represented by the assignee appointed by the court. It is, therefore, clearly the duty of a State court, as soon as it has legal information of the plaintiff or defendant in a suit, having filed a petition praying to be declared a bankrupt, to suspend any further proceedings in the case, until the assignee is legally made a party. The proceedings in a voluntary bankruptcy, in a considerable degree assimilate themselves to our *cessio bonorum* or voluntary surrender of property; and although the act of Congress, unlike our law, does not provide for a cumulation of all actions to which the bankrupt is a party, in the court where the proceedings in bankruptcy may be commenced, still we must bear in mind the great object of the law, and not permit one creditor to get an undue preference over another.

This question, it is stated, has been before the Circuit Court of the United States in Massachusetts, and the reported observations of Judge Story, so fully meet our views, as to render it unnecessary to do more than repeat them.

"By the bankrupt act of 1841," says Judge Story, "the District Courts of the United States are possessed of the full jurisdiction of courts of equity over the whole subject matters which may arise in bankruptcy.

"By the common law, liens exist only in cases where the party entitled to them has the possession of the goods, either actual or constructive; but in the maritime law they are recognized independently of possession, and so in equity jurisprudence. But a lien in equity is not a property in the thing itself, nor does it constitute a right of action for the thing.

"An attachment on mesne process does not come up to the exact definition or meaning of a lien, either in the general sense of the common law, or in that of the maritime law, or in that of equity jurisprudence. At most it is no more than a contingent, conditional security to satisfy the judgment of the creditor, if he ever obtains one.

"A foreign attachment, like a common attachment on mesne pro-

cess, is a remedy directly given and regulated by law to enable a creditor to obtain satisfaction of his debt, and, like every other remedy is liable to be defeated by any act that bars or takes away the remedy or right to judgment under it.

“In case of attachment of the property of a bankrupt, on mesne process, before the proceedings in bankruptcy are instituted, if he obtains a discharge before any judgment is rendered in such suit, such discharge is pleadable as a bar to that very suit, and will prevent the attaching creditor from completing his attachment by a judgment.

“By a decree of bankruptcy, all the property and rights of property of the bankrupt are divested out of him and vested in the assignee, as soon as one is appointed, and such decree relates back to the time of petition; consequently, pending the proceedings in bankruptcy, before or after the decree, an attaching creditor will not be permitted to go on with his suit against the bankrupt, and proceed to trial and judgment, because there can be no party defendant properly before the court.

“If an attaching creditor, with a knowledge of the fact that the proceedings in bankruptcy have been instituted, should nevertheless proceed in his suit to get a judgment against the bankrupt before an assignee is appointed, it would be a fraud upon the law; and if such creditor should obtain satisfaction of his judgment, it *seems* that he would not be allowed to hold the money.

“No attaching creditor, by a mere race of diligence, while the bankrupt proceedings are in progress, will be permitted to overreach and defeat the just rights of other creditors, or the right of the bankrupt, if entitled to a discharge, to plead the same in bar of a judgment in such suit. In such a case the court will enjoin a creditor from proceeding farther in his suit than is necessary to protect his ulterior rights, and will allow the writ and proceedings of the attaching creditor to be entered in the proper court, and to be continued, if the creditor elects so to do, until the discharge of the bankrupt is obtained; but not to proceed in the mean time to trial or judgment. A., by a writ of attachment from the State court, attached the goods of B.; soon afterwards B. petitioned for the benefit of the bankrupt act; and then, fearing that A. might proceed to get judgment, before he could be declared a bankrupt

and obtain a certificate of discharge, and levy his execution upon the goods attached, B. applied to the District Court for an order to stay further proceedings by A. in the suit, and for other relief.

"It was held that the District Court had authority to control the proceedings of A. in the suit; that A. might be permitted to enter his action, and continue it; but that he had no right during the proceedings in bankruptcy, to proceed to a trial and judgment in the suit."

The counsel for the plaintiffs insists upon their right to proceed with the case, because, he alleges, they have obtained a lien or preference, which entitles them to be paid out of the funds attached. There might be some force in this argument, if the defendant had not become insolvent before the judgment; but that fact materially changes the case. Had the plaintiffs gone on, in the ordinary mode, and obtained a judgment against the defendant, they would have been entitled to a preference in being paid by the garnishee, as they would have had a judgment against him; but as no such judgment was obtained, and the debtor has become insolvent, it has been long settled by this court that no privilege is created. 12 Mart. 32.

It is further said, it may turn out that the application of the defendant to become a bankrupt will be rejected, and that it would be highly injurious to the plaintiffs to have their action dismissed, or their proceedings arrested. This may be true; and as there is no evidence, in this case, that a decree in bankruptcy has ever been rendered, we think the proceedings should only have been suspended, for a reasonable time, to enable the party to file the decree, when it would be the duty of the plaintiffs to make the assignee a party, upon whose appearance the legal rights of the parties might be settled.

We cannot imagine any step likely to produce more confusion, than permitting a course like the present to be pursued. The creditors and debtor both reside in the same city. The former finding the latter on the eve of bankruptcy, despatch the evidence of their debt to a distant state, where the debtor has property; sue out an attachment, and claim an exemption from the proceedings in bankruptcy, which are pending at their own door. The bankrupt law would be any thing but uniform, if such proceedings were tolerated.

We think the District Judge erred in not sustaining the defendant's exception, in part ; and in proceeding to give judgment in favor of the plaintiffs.

The judgment of the District Court, is, therefore, reversed, and the cause remanded, with directions to the judge to suspend proceedings in it, until the decree in bankruptcy, if one has or shall be obtained, be filed ; and upon the production of it, and on the assignee being made a party ; to proceed according to law and the principles herein expressed ; the appellees paying the costs of this appeal.

SAME CASE—ON AN APPLICATION FOR A RE-HEARING.

Micou, for a re-hearing. The parties reside in Boston. The plaintiffs, on the 9th February, 1842, attached the rights of the defendant for debt, in the hands of certain garnishees residing in New Orleans. On the 14th February, in Boston, the defendant filed his petition, under the bankrupt law of the United States, praying to be declared a bankrupt. The attorney appointed by the court from which this appeal is taken, to represent the absent defendant, pleaded "the surrender of the bankrupt's property and his act of bankruptcy, as conclusive of all suits, whether by attachment, or otherwise." The fact of the filing of the petition, to be declared a bankrupt, was admitted ; but the exception was overruled, and judgment rendered for the plaintiffs. The defendant, by his counsel appointed, &c., has appealed. On the 17th May, after the appeal had been filed in this court, upon the suggestion of the counsel for the defendant that a decree of bankruptcy had intervened, "it was ordered that George F. Kuhn, assignee, be made a party to the suit, in lieu of the defendant." The record does not show that there was any appearance on the part of the assignee, nor that any steps were taken to make him a party to the proceedings. The counsel of the defendant has contended, that the filing of the petition to be declared a bankrupt, operates as a supersedeas or stay of proceedings in the State

court; and that the court below could proceed no further in the case, until the appearance of the assignee. The opinion pronounced by this court recognizes the position, and, accordingly, remands the case, and orders the court below to allow a reasonable time for the appearance of the assignee, and then to proceed in accordance with the views expressed in the opinion.

It was not until this opinion had been pronounced, that the counsel, now appearing, became interested in the case, and prayed for time to present a petition for a re-hearing. The court, willing to hear and examine all that could be urged against its opinion, and no doubt desirous that its decision on a point of such delicacy and importance, should not, when final, incur the imputation of having been pronounced without proper deliberation, granted time. Under the circumstances of the case now presented, it devolves upon the court to determine what effect is produced upon judicial proceedings, both as to the property and person of a bankrupt, by proceedings in bankruptcy under the late law of Congress.

The 3d section of that act declares, that all the property, &c. of every bankrupt, "who shall, by a decree of the proper court, be declared to be a bankrupt within this act, shall, by mere operation of law, *ipso facto, from the time of such decree*, be deemed to be divested out of such bankrupt," &c.; "that the same shall be vested, by force of such decree, in such assignee," &c.; and that "the assignee shall be vested with all the rights, titles, powers and authorities, to sell, manage and dispose of the same, *and to sue for and defend the same*, as fully to all intents and purposes, as if the same were vested in or might be exercised *by such bankrupt*, before or at the time of his *bankruptcy declared* as aforesaid."

The words used are plain, concise and exclusive. It would seem, that if the estate is divested *from the time* of the decree, it is not divested before the decree; and, consistent with itself, the law, recognizing the bankrupt to be the owner until the decree, leaves to him the prosecution and defence of all suits involving the rights of the property, until an assignee be appointed and authorized to succeed him. The same section provides, that "all suits in law and equity, *then pending*, in which such bankrupt is a party, may be prosecuted and defended by such assignee," &c.

If the question is to be decided under these provisions of the

law, it is easily put at rest. The language is plain beyond the necessity of interpretation. The bankrupt remains the owner and represents the property in court, as well as out of court, until the decree; then his place is filled, *quoad the property*, by the assignee. In regard to his personal rights and his future property, the bankrupt himself remains their guardian. To make the application to the case before the court, we would say that the exception filed should not have been regarded, and that the court should have proceeded, as it did, to give judgment against the bankrupt, who was the only defendant in the cause. The rights of the assignee, if one were appointed, would not be precluded by the judgment.

The only expression in the law itself relied on to control the provisions of the third section, is that contained in the first section. It declares that any debtor whose debts, are of a certain character, filing his petition in the form prescribed, "shall be deemed a bankrupt within the purview of the act, and may be so declared," &c. The argument, then, assumes, that the debtor, being deemed a bankrupt from the date of the petition, the decree, when pronounced, necessarily reverts to the date of the petition, and that the property is therefore divested *from that date*; in other words, that the consequence of being *deemed* a bankrupt, is the divesting of the property and judicial rights. But we must not forget that this is the sole act of the United States upon the subject of bankruptcy; that there is no law, either common or statute, of the United States, which says that a bankrupt shall have no rights of property; and, that our ideas of the effect of bankruptcy, are derived principally from the English law. There is nothing in the meaning of the word bankrupt, any more than in the word insolvent, that necessarily implies a divesting of property. If the law fixed no time, *from which* the decree, when pronounced, should operate, the courts would hardly be justified, under this expression, in giving it a retroactive effect. Still less can so remote an inference control the positive provisions of the law.

The counsel argues, that the supposed stay of proceedings from the filing of the petition, and the relation back to that date of the powers of the assignee, result—

First. From the object and intent of the law itself.

Second. From the established principles and cases under bankrupt laws in general.

Third. From the spirit and policy of the bankrupt laws of Louisiana.

Before considering any of these arguments, we must advert to the first principles or rules of interpretation. The object of construction is to ascertain the will of the legislator. If the words of the law are plain—if one part of the law does not contradict another, nothing remains for interpretation. The will of the law-giver being understood, courts have only to carry it into effect. “When a law is clear and free from all ambiguity, the letter of it is not to be disregarded, under the pretext of pursuing the spirit.” Civil Code, art. 13.

So Blackstone, vol. 1, p. 59, says, the *words* of the law in their ordinary meaning, are *first* to determine the will of the legislature. It is only when the language of the law is ambiguous or obscure, that judges are permitted to resort to the *context*, the *subject matter*, the *effect* and *consequences*, or the *reason and spirit of the law*.

There being nothing ambiguous in the language of the third section—there being nothing in the law itself contradicting its expressions, it might well be assumed that the words of that section put an end to the argument. But a proper deference for the authorities cited, and for the court itself, which has pronounced an opinion adverse to these views, admonish me that it may be unsafe to rest upon even these indisputable principles.

In examining the positions taken by the opposite counsel, I will reverse the order adopted by him, and first consider the enactments of other systems of bankruptcy, because, by comparing them with our own when analogous, and by contrasting them when different, we shall be better prepared to form a correct opinion of what was the true intention of Congress upon this important point. The statute of 13th Elizabeth, c. 7, gave to the commissioners in bankruptcy “full power to dispose of all the lands and tenements of the bankrupt, which he had in his own right, *when he became a bankrupt*, or which shall descend to him,” &c. 2 Blackstone, 285.

“By virtue of the statutes of 1 Jac. I, chap. 15, and 21 Jac. I, c. 19, all the personal estate and effects of the bankrupt, are con-

sidered as vested, by the act of bankruptcy, in the future assignees of his commissioners." 2 Ib. 485.

"The property vested in the assignees, is the whole that the bankrupt had in himself, *at the time he committed* the first act of bankruptcy," &c. 2 Ib. 485. For the words of the statutes, see Bacon's Abridgment, *verbo* Bankrupt. As the act of bankruptcy might have long preceded the suing out of the commission, the dealings of the bankrupt with others, even without notice, were liable to be set aside, and great injury and injustice frequently resulted. Hence the necessity of modifying the doctrine of relation was soon felt, and various exceptions were made, from time to time, by the laws. These exceptions are stated in their order, in Eden on Bankruptcy, (258-9, London edition,) and, with every other portion of the bankrupt code of Great Britain, were digested in the consolidating act of 6 Geo. 4, c. 16. By the statute of 2 & 3 Vict. c. 29, "all dealings and transactions with any bankrupt, *bona fide* made and entered into before the date and issuing of the fiat against him, and all attachments and executions against the lands and tenements or goods and chattels of the bankrupt, *bona fide* executed or levied before the date and issuing of the fiat, shall be deemed to be valid, notwithstanding any prior act of bankruptcy;" provided the person so dealing with the bankrupt, or at whose suit such execution or attachment shall have issued, had no notice of the prior act of bankruptcy. See statute quoted in note, 38 Eng. Com. Law, Rep. 134.

The Code de Commerce of France enacts, art. 441. "*L'ouverture de la faillite est déclarée par le tribunal de commerce, son époque est fixée, soit par la retraite du débiteur, &c.*"

Art. 442. "*Le failli, à compter du jour de la faillite, est dessaisi de plein droit, de l'administration de tous ses biens.*"

Art. 443. "*Nul ne peut acquérir privilège ni hypothèques, sur les biens du failli, dans les dix jours qui précèdent l'ouverture de la faillite.*"

Under the first bankrupt law of the United States, the provisions of the English law were adopted. The assignment made by the commissioners to the assignee of the bankrupt's estate, "shall be good at law and in equity, against the bankrupt and all persons claiming under him *by any act done at the time, or after he shall*

have committed the act of bankruptcy ;" provided, that *bona fide* purchases by persons having no notice of the commission of the act, shall not be invalidated. Acts of 1800, ch. 19, sect. 10.

The provisions of the law of Louisiana are too familiar to justify their being quoted at length. Suffice it to say, that a judicial stay of proceedings was granted by the judge, as the first step in the *cessio bonorum*, under the Spanish jurisprudence, whence our own is derived. *Elmes v. Estevan*, 1 Mart. 193. That the same formality was directed to be observed by the Code of 1808, p. 294, art. 172 ; by the act of 1817 ; and by the Civil Code of 1825, art. 2172. The petition of the debtor imports a surrender of property, which the act of 1826 directs the judge to accept for the benefit of the creditors, and all subsequent attachments, seizures and levies are expressly forbidden. The date of the cession, when the surrender is voluntary, and of the petition of the creditors, in the few cases of involuntary bankruptcy, is definitely fixed as the period when the power of the debtor over his estate ceases, and that of the creditors begins.

The first and most striking suggestion, presented by the quotations which we have made from these laws, is that in no one of them is the point of time, at which the debtor ceases and the assignee begins to be the owner of the property of the bankrupt, left to inference or argument. In all of these systems, that date has been fixed by positive and express enactment. Indeed, there is no single feature of the bankrupt law of greater importance ; none so apt, if left uncertain, to give rise to litigation, and to unsettle the titles to property and estates.

Now in the construction of a law, other laws in *pari materia* are properly consulted. "What is clear in one statute, may be called in aid to explain what is doubtful in another." Civ. Code, art. 17. This rule must generally refer to acts of the same legislature, for the will of one legislature may be better inferred from its own acts, than from the acts of other legislatures. Yet if the laws of two countries, on the same subject, appear, from their points of resemblance, to have had a common origin—to have been founded on institutions, habits and wants of a similar character, each code forms for the other, a valuable and legitimate source of argument and authority. But in their comparison, we must take care not to confound them, or to adopt for one country the will of the legislature

of another country. If particular provisions of the two laws coincide, the clear expressions of the one code, may be cited to illustrate the *doubtful* terms of the other. But if, from the comparison, a contrast results, instead of a resemblance—if the language of our law be clear, but in direct opposition to the corresponding provision of the statute cited for illustration, what are we to conclude, save that the foreign system has been examined and rejected, and that our legislature has willed that the law shall be different from it elsewhere? A reference to foreign statutes, with any other view, is inadmissible. To argue that a positive provision of our law can be controlled, by showing that it differs from other laws, is to maintain that the will of a foreign legislature is superior to the power of our own. The argument degenerates into paradox, and assumes that the law is different from what the legislature that made it, intended it should be. Yet the counsel contends, that the policy and language of the law of England and of the law of Louisiana support his doctrine, and, therefore, that the law of Congress upon the same subject, must necessarily be the same. If the argument be not striking from its force, it is certainly remarkable for its novelty.

The counsel quoted at large the provisions of the third section, yet he did not favor us with any comment upon the expressions used "*from the time of the decree,*" &c. He treats the question at issue, as one depending solely upon deductions from the spirit and intent of the law, and of other laws; and in his eagerness thus to infer a rule, he has overlooked the rule expressly prescribed by the law itself.

The omission of Congress to fix a date at which the bankrupt law should affect the property of the bankrupt, would have evinced the most culpable disregard of the public welfare, which it is supposed to be the object of all laws to promote. If such an extraordinary omission had occurred, perhaps it would have been the duty of the courts, at all events they would have found it necessary, to fix the date which the law had failed to prescribe. Other systems would then be referred to, their provisions would be compared, and the will of the legislature would be supposed to approve the period adopted by that system offering the most numerous points of coincidence with our own. But no such

omission can be imputed to Congress. The bankrupt law has fixed the date of its own operation. That it differs from the date prescribed by other laws, only shows more clearly the intention to adopt a different rule. The will of our legislature is placed in more prominent contrast with the will of other legislatures, and other systems must be cited to show, not what has been adopted, but what was rejected.

We find, accordingly, that the English law expressly refers the operation of the bankruptcy, and the powers of the assignee, to the commission of an act of bankruptcy. That the law of France divests the debtor, from the day of the failure. That the bankrupt act of the United States, passed in 1800, re-enacted in terms the provision of the English law; that the law of Louisiana vests the property in the creditors, from the moment of filing the petition; and that the law of Congress, in terms equally explicit, vests the property in the assignee, from the date of the decree.

Each system has its rule. Which is the most conducive to the public welfare—which is best adapted to ensure a just and equal distribution of the property, are questions of legislative and political economy, which it would be worse than idle to discuss in a judicial proceeding before this court. The law having prescribed a rule, that rule must be obeyed, although the court should be of opinion that a better one might have been adopted.

The argument of the opposite counsel begins with the assumption, "that when the bankrupt files his petition and schedule, he surrenders his property to the court, which *by law* is made the administrator of the debtor's effects, for the benefit of all his creditors; and that the property and rights of property surrendered, become by operation of law divested out of the bankrupt, and pass from the hands of the court into those of the assignee." In the consideration of questions arising under the late bankrupt act, we should be careful not to suffer our familiarity with other systems to mislead us, or to withdraw our attention from the actual provisions of the law itself. It is difficult to divert the mind from its accustomed bias, and to conduct its impressions into a new channel. The theory of the bankrupt laws of England and of Louisiana, have been so deeply impressed upon our minds, that we are led almost unconsciously to consider the doctrine of rela-

tion, borrowed from the one system, and the stay of proceedings and the *concurso* of *all* the creditors, peculiar to the other, as forming a necessary and indispensable part of every system of bankruptcy. This caution is of the greatest importance. No stronger illustration of its necessity could be given, than the quotation of the paragraph from the argument on the other side.

In reading it, one would necessarily suppose that the counsel was stating the law of Louisiana, and not the law of the United States. Applied to the latter, it begs the question. It begins where the argument should have ended; and every proposition in the quotation is unfounded and erroneous. The filing of a petition in bankruptcy is not a surrender of property. The court is not by law the administrator of the debtor's estate; nor does the estate pass from the hands of the court, to those of the assignee.

The filing of the petition is not a surrender of property. The most attentive examination of the first section of the act, and of the form of the petition, prescribed by the Supreme Court of the United States, will furnish no ground for such an idea. The petition does not purport to be a surrender. It is not treated as such by the law, or by the court. It is simply a confession of insolvency, and a prayer for a decree and discharge. It implies an *offer* to surrender the property; for the divesting of the property of the petitioner, is the consequence of the decree which he solicits. The most ingenious construction can make it no more. But the difference between an offer to surrender, and an actual surrender, is sufficiently obvious. It may well be questioned whether this offer be irrevocable. There is nothing in the law which forbids the petitioner from retracting it. Before the decree, his circumstances may change, or he may conclude that they do not require the interposition of the law, and discontinue his prayer for the relief he no longer desires. His debts may be of such a character as to exclude him from the benefit of the law; and his creditors, cited for that end, may appear and show cause why the decree should not be granted. So far then from being a final and irrevocable surrender, the petition is but an offer to surrender, which may be withdrawn by the petitioner, resisted by the creditors, or refused by the court.

The court is not by law the administrator of the bankrupt's

effects. We have seen the fallacy of supposing that the property is vested in the court, either in form or substance, by filing the petition; and the court cannot administer that of which it has not possession or control. Nor does the law provide any mode of temporary administration.

The commissioners under the English law and under the bankrupt act of 1800, took immediate possession of the bankrupt's estate, and held it until the appointment of assignees. In Louisiana the judge accepted the cession, and appointed, if necessary, provisional syndics. In France the seals are affixed to the debtor's effects, and commissioners and agents are named by the decree opening the failure. Code de Commerce, arts. 449, 454. No corresponding provisions are found in the act of Congress. If it was intended that the property should be divested from the filing of the petition, the omission to provide some guardian for the estate, until the appointment of an assignee, would have been most remarkable. The absence of any such provision, corroborates the opinion that the property remains in the debtor until the decree.

If, then, the property never vests in the court, we may safely conclude, that it does not pass from the hands of the court into those of the assignee. It passes at once from the debtor to the assignee. The decree, which divests the one of his estate, invests the other, and makes the assignee, like the heir of the ancestor, the legal representative of the bankrupt.

The position assumed by the counsel leads to another anomaly. The court is not empowered itself to administer the property and protect the rights, either of creditors or of the debtor, during the interval between the petition and the decree, or to appoint an agent for that purpose. But, says the counsel, the bankrupt is divested by filing his petition. It follows, then, that there is an interval, during which the property has no owner and no administrator, and suits can neither be prosecuted nor defended. Such a result is contrary to the whole policy of our laws. Accident sometimes leads to delay in the qualification of an administrator, or the appearance of a new party to a suit; but no legislature ever enacted, that there should be, in the ownership of estates, or in the progress of judicial proceedings, a necessary and unavoidable *hiatus*.

But the argument which seems to have had the greatest weight

with the court, is drawn from the supposed policy of the bankrupt law. It is said that the great object of the law is to secure a *pro rata* distribution of the property of the debtor among his creditors; and that this object may be defeated by leaving the debtor in full control, and permitting the prosecution of suits, after filing of the petition. It is feared that creditors might suffer by the frauds of the debtor, and that suits, by collusion, or in the usual scramble for preferences, being prosecuted to execution, the property, the pledge of all the creditors, might be engrossed by a few. It is even suggested, that the description of property in the schedule would point it out for seizure, and assist in defeating that equitable distribution which the law intended to secure.

These objections appear very formidable, but we think a little reflection will diminish their importance. The first step in the proceeding, is the presentment, under oath, of a statement of the property and debts of the bankrupt. The creditors are cited to a public investigation of his affairs. The least violation of the law deprives him of the relief which he asks from the court; and his conviction of falsehood consigns him to a prison and to disgrace. Fraud, at such a time, need not be apprehended. The dishonest debtor, seeking to defraud his creditors, would scarcely await the filing of his petition, to accomplish his purpose. He would be more inclined to execute his fraud, and to allow such time to elapse as would cover it with the mantle of oblivion, before making his application, than to select for its perpetration, that period, of all others, the most unpropitious of success and impunity. Nor can it fail to strike the court, that the stay of proceedings itself would be a cover for fraud, and afford the greatest facility for its perpetration. The legislature of Louisiana, impressed with this fact, provided various modes of protecting the interests of creditors, by the appointment of provisional syndics in some cases, and the imprisonment of the debtor, or the sequestration of his estate, in others. But in the act of Congress we find no such precautions against the frauds, to which a stay of proceedings would tempt the dishonest.

It is true that, in the interval between the petition and the decree, some of the creditors may press their suits to execution, and obtain a preference over the rest. If this preference be acquired

by fraud or collusion, the law condemns it, and the assignee is authorized to have it set aside. If, on the other hand, it results from the regular course of judicial proceedings, we cannot perceive any reason why the creditor should be deprived of the reward of his vigilance. A levy, on the day before the filing of the petition, would certainly secure a lien. Would it be any more unjust or unreasonable, to grant the same lien to a levy made on the day after the filing of the petition? In both cases the gain of the seizing creditor is the loss of others; he is paid at the expense of the mass. In every case of *insolvency*, the creditor who forces payment by execution, is paid at the expense of other creditors—he diminishes the fund, from which they are to expect payment. As a matter of abstract justice and equality, the period of insolvency would then seem to be the point, at which preferences should cease to be acquired by legal pursuit; but that period is too vague and indefinite—too difficult of proof, and too fluctuating, to furnish a safe or salutary rule. Such a principle would throw open the doors of litigation and doubt so wide, that no man could rest secure upon his judicial rights. No system, with which we are acquainted, has attempted to adopt it.

The general policy of the law, is to encourage the competition of creditors; the most vigilant obtain the highest favor. But bankrupt laws are an exception to the principle. They prescribe a period when the race of vigilance shall cease. To say that this period should be fixed by the courts, upon considerations of equality and justice, would only be to leave it uncertain. To be definite, it must be fixed by arbitrary power. The legislature, in the exercise of its peculiar duties, having weighed all the considerations of policy applicable to the subject, must prescribe a rule. When prescribed, it governs the courts, like any other arbitrary act of the superior power.

This evil of occasional preferences, acquired by vigilance, is, however, more imposing in theory than in practice. It is only in a few large cities, that legal process is so summary, as to afford facilities for its occurrence. Throughout the country generally, the process is too slow; the delay between citation and trial—between judgment and execution, is too great, to give room for many, or important changes, in the rights of creditors, in the short

interval between the petition and the decree. Congress may well have regarded such occasional preferences, as a less evil, than the increase and complication of the machinery of the court, necessary to prevent it. In the attempt to establish a system both cheap and simple, some minor considerations would necessarily be sacrificed.

In England, bankruptcy was regarded as a crime. The forfeiture of the property was a punishment of the offence. As treason operated a forfeiture to the king, from the moment of its perpetration, so the estate of the bankrupt was forfeited to his creditors, from the commission of an act of bankruptcy. The suing out of a commission, was likened to the interdiction of a prodigal or a madman. It was the action and execution at once. (Bacon's Abridgment, *verbo* Bankrupt)—the *execution paré* of the common law. But this system has been greatly modified. A bankrupt is no longer treated as a malefactor. A debtor, desirous of surrendering his property, is no longer compelled, though innocent, to assume the demeanor of the criminal—to keep his house—to depart the realm—to lie in prison—in order that the most friendly of his creditors, may sue out his commission. By the act of 6 Geo. 4, sec. 6, he is permitted to make his declaration of insolvency, before the chancellor's secretary in bankruptcy, and thus openly solicit the interposition of the law.

So the doctrine of relation, originally a stern and unbending rule, annulling all transactions after the commission of the act, was from time to time relaxed. The extreme hardship and injustice sometimes resulting from its enforcement, led to the enactment of many and important exceptions, (Eden, 259,) until at last, by the statute 2 and 3 Vict., all transactions, payments, and seizures under execution, are protected, unless the party benefited thereby had actual notice of an act of bankruptcy.

The government of the United States once adopted the original system of Great Britain, but abandoned it, after a short trial. In resuming the consideration of the subject, forty years afterwards, it would have been indeed unwise in our legislators, to have rejected the improvements which had intervened in the system, and to have re-enacted it, with all its obsolete and discarded errors. Congress did not fall into so lamentable a mistake. They endeavored

to improve upon the system *now in force* in England, and to adopt one more simple, more expeditious, and more liberal. The law which resulted from their deliberations, is in many respects imperfect. It could not have been otherwise. A system of such great importance, could not, by a single effort, be brought to perfection; but the desire to abandon the errors of other systems, while their best features were preserved, was, no doubt, the prevailing spirit in the formation of the law.

The declaration of insolvency, is still the only step which the debtor can take, under the English law. The creditors alone can prosecute the fiat or commission. Congress went still farther. It authorized the debtor, not only to initiate the proceedings, but to prosecute them to the surrender of his property, and to his own discharge. So, instead of reviving the doctrine of relation, almost abandoned where it originated, Congress discarded it altogether, and fixed upon the date of the decree as a more definite and notorious point, from which the powers of the assignee over the estate of the bankrupt should commence. At the same time, the rights of creditors were protected, by stamping with nullity every act in contravention of the law, and by giving to the assignee full power to recover any advantage, *illegally* obtained.

We infer then, from what is enacted by the law, and from all that it has failed to enact, that until the decree, there is no change in the title to the bankrupt's estate, or in his right to administer and protect it; and, consequently, that the filing of the petition is not a reason for a stay of judicial proceedings.

The stay of proceedings under the law of Louisiana, was a consequence of the *concurso of all the creditors*, an institution, with its name, derived from the Spanish jurisprudence. As all creditors, without exception, were brought into the bankruptcy, there was no occasion for separate proceedings. For the same reason, it was a part of the theory of the law that the bankrupt, from the moment of his cession, was *civiliter mortuus*. *Elmes v. Estevan*, 1 Mart. 193. *David v. Hearn*, Ib. 207. The control of the syndic extended over all the property of the debtor, without regard to the liens, pledges, mortgages, or privileges affecting it. The law did not profess to annul these preferences, but it altered the remedy upon them. The execution of writs, issued even on final judg-

ment, was superseded. The syndic took from the hands of the sheriff, property seized under execution, and became himself the executive officer of the law in selling it. *Bermudez's Syndics v. Ibanez*, 3 Mart. 39. Civ. Code, art. 2180. Act of 1826. After the sale of the *entire* property, the proceeds were distributed to those having liens and privileges, in their respective ranks, and then to the ordinary creditors. The tableau of the syndic, therefore, embraced the whole range of liens, privileges and mortgages, conventional, tacit and legal, that abound in our laws.

But the whole of this system is unknown to the English law. Judicial process, there, is never interrupted.

"Although all acts in relation to his property, done by a bankrupt after an act of bankruptcy, *may be avoided* by the assignees, subject to certain exceptions by express statute, yet the bankrupt is still capable of maintaining actions, and no one can take advantage against him, by plea of his bankruptcy, before the commission and assignment under it; the legal property remaining, till actual assignment, in the bankrupt himself. Cullen, 412.

Even after the issuing of the commission, although the property of the debtor is thereby withdrawn from new pursuit by legal process, the creditor is "still at liberty (until the discharge,) either to come in and take a proportionable benefit, under the commission, or to proceed against the person of the bankrupt, in the ordinary course of law." Cullen, 148.

The discharge itself does not operate as a stay. The mandate of the judge in the *cessio bonorum*, was binding upon the courts and creditors, without a plea—a judgment, rendered in violation of it, was a mere nullity; while the discharge of the bankrupt, in England, can only avail him by *plea or motion*. Cullen, 399. Its operation is not to supersede legal process, but to confer on the bankrupt a new means of defence, which he can plead in bar, and which secures a judgment in his favor. If a creditor in England has a mortgage, a pledge, or a lien, or if he has made a seizure under execution, the bankrupt law does not interfere with his rights. It leaves him to his possession, or permits the sheriff to proceed with the sale, and to pay over the money to the *plaintiff*. The assignee has no power to disturb the possession, either of the creditor or of the officer. He is only authorized to *redeem* the pro-

perty, by paying the amount of the lien, or by a performance of the condition, on which the right to the possession depends. Eden, 286, 290, 294. Cullen, 209. "He takes the property, in the same condition and subject to the same burthens, as the bankrupt himself had it." Cullen, 185. Hence the jurisdiction of the bankrupt courts is limited to the superintendence and control of *matters in bankruptcy*, and to controversies with, or between creditors, *who come into the bankruptcy*. 3 Chitty's Gen. Prac. 543.

Creditors having securities may keep out of the court. They have the choice of tribunals. They may proceed in the ordinary courts, or, if they ask the assistance of the bankrupt court, it will be given them. Eden, 451-2. 38 Eng. Com. Law Rep. 582. They discuss the property, affected by their peculiar claims, not in a *concurso*, but in their own suit. If it is more than sufficient to pay them, the assignee receives the excess; if less than their claims, they then go into the bankruptcy as ordinary creditors, for their *pro rata* upon the balance. Proof in bankruptcy is a technical proceeding, involving a submission to the jurisdiction of the bankrupt court, a release of all right to preference, and a consent to a *pro rata* dividend. Cullen, 145. Hence the English assignee is the agent, and English bankruptcy is the *concurso*, not of *all* the creditors, but of the chirography creditors alone.

Now the two systems—that of Louisiana, and that of England, are not only unlike, but in these important particulars are diametrically opposed. Which of the two was adopted as the model of the bankrupt law of the United States? A Congress, composed of the representatives of twenty-six states, all, save one, governed by the common law of England, and familiar only with the English jurisprudence, would naturally prefer the system with which it was best acquainted. The English system was, beyond all doubt, the model of our own. The act of Congress is but an abridgment of its provisions, with such changes and omissions, as were deemed necessary to accommodate it to the greater freedom and liberality of our institutions. An extension of the right of voluntary bankruptcy, a further restriction of the doctrine of relation, and a greater facility in obtaining a discharge, are the most prominent changes in the principles of the law. The court has observed, that the bankrupt law of the United States assimilates in a great degree, to

the law of Louisiana. In certain points, all bankrupt laws must necessarily bear a resemblance to each other. The appointment of an administrator of the property of the bankrupt, the distribution among the creditors, and the release of the debtor, either partial or entire, are of the essence of all bankrupt laws. But take out these points of resemblance, and look through the details of the respective laws—the powers of the assignee—the rights of particular creditors—the extent of bankruptcy jurisdiction, and the cumulation of suits, and we find, instead of resemblance, the most striking and pointed contrast. On the other hand, compare the law of Congress, in all these particulars, with the English law, and we observe a coincidence, as marked as the contrast exhibited by the first comparison.

There is certainly no provision in the act of Congress for a judicial mandate, staying proceedings either against the debtor or his property. How far the proceedings, from their character, operate as a supersedeas, will be seen by a short review of some portions of the law.

The *concurso* in bankruptcy, does not embrace *all* the creditors. The law distinctly recognizes two classes of creditors, viz : those who claim under the bankruptcy, and *those who do not claim under the bankruptcy*. Over the latter, the law assumes no control. If they are ordinary creditors, they lose their dividend, by neglecting to make their claims ; if they have securities, they are left to the exercise of the legal rights resulting from such securities, without being forced to come into the bankruptcy.

Although the general provisions of the law could not fairly have been held to destroy any securities, lawfully acquired before the bankruptcy, the law, from abundant caution, has made express reservation of such rights. The description of the rights so protected, is given in the most comprehensive terms. "The lawful rights of married women or minors, or any liens, mortgages, or other securities on property, real or personal, which may be valid by the laws of the States respectively," (sec. 2,) fairly embrace every right to a preference, known even to the laws of Louisiana. There is a qualification that such rights must not be "inconsistent with the provisions of the second and fifth sections ;" and, it is sometimes contended, but without reason, that this reservation destroys

the proviso, to which it is appended. The only securities inconsistent with the provisions of the second section, are those given by the bankrupt, "in contemplation of bankruptcy," by way of preference to creditors, or fraudulently to persons other than "creditors and *bona fide* purchasers "without notice." All securities, so conferred, are declared to be a fraud upon the law and void; the assignee is authorized to have them set aside; and, of course, they do not come under the protection of the proviso. Let us now see what securities are inconsistent with the provisions of the fifth section.

That section declares, that "all creditors *coming in and proving their debts*, under the bankruptcy," shall share in the bankrupt's estate "*pro rata*, and without any priority or preference whatever," except only for debts due to the United States, to certain sureties, and to laborers. It further enacts, "that no creditor, *coming in and proving his debt*, shall be allowed to maintain any suit, at law or in equity, therefor, but shall be deemed thereby to have *waived* all right of action and suit *against such bankrupt*; and all proceedings already commenced, and all unsatisfied judgments, already obtained thereon, shall be deemed to be *surrendered thereby*."

Thus it would seem, that by securities not inconsistent with the provisions of the fifth section, are meant *those which shall not have been proved in bankruptcy*. The proviso of the second section protects them, unless, being *waived* by proof, their further existence, *as preferences*, becomes inconsistent with the *prorata* distribution to all *who have proved their debts*.

If, then, a creditor, holding a security, values the protection offered to him by this proviso, he must keep out of the bankruptcy. If he "*comes in and proves his claim*," he does an act inconsistent with, and destructive of his right to a preference. The loss of the preference is, in that case, not the result of the law, but the voluntary act of the creditor, duly and fairly admonished by the law of the consequences of the act. If he prefers his dividend to his pledge, to his mortgage, or to his right of action, the law throws no impediment in the way of his free selection. "He can claim under the bankruptcy *or* against it, but he cannot do both, at the same time." Cranch, J. The law prescribes no

mode of proof, by creditors holding securities ; no form of reservation, by which, when proving, they may secure their preference. It contains no instructions for a classification of debts, giving to one creditor the proceeds of this property—to another, the proceeds of other property—recognizing this creditor as entitled to a general, and that to a special privilege. With the few exceptions already named, all *who prove*, are paid *pro rata* ; and the very form of division dwindles, from the complication and ceremony of a tableau of distribution, to the simple declaration of a dividend.

The securities in question, though protected by the law, are not available in the bankruptcy. By bringing them into the bankruptcy, all right of action is *waived*, and all proceedings and unsatisfied judgments *surrendered*. Does it not follow, that if a creditor will not *waive* his right of action against the bankrupt, the right still exists ? If it were destroyed by the mere filing of the petition in bankruptcy, no right would rest in the creditor, to be afterwards *waived* by him. Does it not follow, that the proceedings at law, by which alone mortgages, liens and privileges can be enforced, remain within the reach of the creditor, unless he consents to surrender them ? If these proceedings, the sole remedies upon such securities, are destroyed by the transfer of the bankrupt's rights to the assignee, what means the solemn farce of enacting *how* the right to them, no longer in existence, may be *surrendered* ?

If, then, the law intends that these rights shall not, by its provisions, "be annulled, destroyed, or impaired," and, if they cannot be enforced in bankruptcy, it follows, necessarily, that they must be asserted in the ordinary tribunals. So far from impairing them, the law does not interfere with them. The remedy upon them remains the same ; the form of action is unaltered, save that the claims asserted before the decree, against the bankrupt, must, after the decree, be ascertained and enforced, contradictorily with the assignee. Hence the assignee is empowered to sue and defend, like the bankrupt ; to succeed him in all suits, pending at the date of the decree ; and to prosecute and defend, in the same manner, as the bankrupt might have done before his bankruptcy. He is not confined to the court of bankruptcy ; but under these broad expressions, every court of ordinary jurisdic-

tion is open to him, as plaintiff; and every such court, whose process can be served upon him, may exercise jurisdiction over him, as defendant, and bind him by its decrees. His position is more consistent than that of a syndic under the laws of this State, who is the representative and agent of conflicting interests and parties. Representing only the creditors who come into the bankruptcy, and specially charged with the protection of their rights, he contests, in all courts, the claims of creditors who do not come in, and who seek to diminish the assets of the bankruptcy.

The very organization of the bankrupt court, adds force to the position contended for. The sixth section, which confers the jurisdiction, limits it to "matters and proceedings in bankruptcy." In further defining this jurisdiction, it is said to extend to all "*controversies in bankruptcy*," between the bankrupt and creditors who shall *claim* any debt or demand, "*under the bankruptcy*," between "*such creditors*" and the assignee, and between the bankrupt and the assignee. The law gives no further jurisdiction, except that conferred by the eighth section concurrently on the District and Circuit Courts, over suits at law and in equity, between the assignee and "persons claiming an adverse interest, touching any property or rights of property, transferable to or vested in such assignee." With this exception, the jurisdiction is limited as strictly to bankrupt proceedings, as that of courts of probate to mortuary proceedings. But every suit against an executor is not a mortuary proceeding; nor is every suit against a bankrupt or an assignee, necessarily a proceeding in bankruptcy. The neglect, then, to provide for the transfer of all suits against the bankrupt to one tribunal, and for their cumulation in a single proceeding, was not the result of casual omission. Legislators, educated under a system of laws whose forms contain no analogous proceeding, would have listened with surprise to any proposal that such a cumulation should form a feature of the law.

It is sometimes said, that the bankrupt's property cannot be pursued elsewhere than in the bankrupt court, because all his property and rights of property are by law *vested* in the assignee. The estate vests in the assignee, as it vested in the bankrupt. He succeeds to the same rights, and enjoys by the same title; but he has no higher rights. If the property, before the bankruptcy,

was subject to liens or privileges, it was vested in the bankrupt subject to such liens and privileges, and it vests in the assignee under precisely the same burden. If, before obtaining possession, the bankrupt would have been obliged to redeem or discharge the pledge, so must the assignee, before he can acquire the possession; and the law provides for the contingency, by directing that the assignee may, under the revision of the court, redeem the property from such incumbrance. Sec. 11.

Considering then the language of the law, its apparent intent and policy, its analogies and contrasts with other systems, we are led to the conclusion, that Congress intended that there should be no stay of proceedings, no cumulation of suits, no *concurso* of all creditors, and no divesting of property (even by relation) before the time of the decree. The law makes no distinction, in these particulars, between voluntary and involuntary bankruptcy. In the latter class, the folly of suspending judicial process, would be flagrant. Such suspense would afford the debtor the best opportunity of withdrawing his person and property from the reach of the court.

With respect to the personal rights of the bankrupt, and his capacity to stand in judgment, we have already seen that the law does not interfere with them. Indeed, the argument of the counsel destroys his case. If the capacity of standing in judgment, was lost to the bankrupt by filing his petition, by what right is he prosecuting an appeal before this court? The court might well inquire of him, in the language of the judge of one of our lower courts, when a similar position was taken—If you cannot appear in court, what are you doing here? The counsel, probably perceiving that his position embarrassed his argument, obtained an order that the assignee should be made a party to the suit; but he has not been made a party, nor has he appeared. The counsel conducted his case in the same right after, as before this order. When the bankrupt shall have obtained his discharge, he may plead it in bar to the suit; but there is nothing in the law giving him the right to plead his *petition*, or even his *decree*, in bar or in abatement. So it has been decided by Judge Cranch, on the application of a bankrupt to be released from imprisonment for debt, after his decree, but before his discharge.

The plaintiff claims to have acquired a lien upon the credits attached in this case. It is not pretended that he has waived his lien, or surrendered his action, by going into the bankruptcy. The law does not require, nor even permit, the cumulation of his suit with the proceedings in bankruptcy; he then remains free to claim a judgment against the defendant until his discharge; and free to prosecute his suit against the property attached in the case, until the assignee shall appear and show, that the attachment was illegal or void. We do not pretend that the judgment in this case would be binding upon the assignee, if his appointment should have been made before the judgment; but it is not an unusual proceeding, for a plaintiff to prosecute his suit against one party in interest to final judgment, leaving other parties interested to protect their interests in some other form. Whatever lien was acquired by the levy—whether inchoate or complete—that lien still exists. The assignee succeeding to the rights of the bankrupt, and to his rights only, cannot claim the property, without relieving it from the lien. If he shall think proper to appear, and if he can satisfy the court that the lien was inchoate only, and that the bankruptcy of the defendant prevented its being perfected; or, if he can show that the levy was made by collusion with the defendant, and in fraud of the law, then the court will decree the property to him, instead of the plaintiff. But he is the only person who can present such issues for the determination of the court, and any decision upon them before they are properly presented, would be premature. It is sufficient for the plaintiff to maintain, that the judgment from which the defendant has appealed, is correct.

GARLAND, J. This case is before us, on an application for a re-hearing. We have carefully re-considered our judgment, and see no sufficient reasons to change it. The application for a re-hearing is, therefore, refused; but in coming to this conclusion, we do not intend to intimate any opinion, as to what may be the effect of the bankrupt law passed by Congress, upon the proceedings in the State courts, when a mortgage or lien is attempted to be enforced on property in the possession of the bankrupt, before or after the appointment of the assignee.

Nolé v. De St. Romes and wife.

NOLÉ v. CHARLES DE ST. ROMES and wife.

Where a slave ordered to be emancipated by will, sues to establish her right to freedom, she must allege and prove that she is thirty years of age, or a native of the State, and that she has behaved well during the four preceding years. Act 9 March, 1807. C. C. art. 185. The act of 31st January, 1827, effected no other change in the law than to authorize, under certain circumstances, emancipation before the thirtieth year.

APPEAL from the District Court of the First District, *Buchanan, J.*

David, for the appellant.

Canon, for the defendants.

MARTIN, J. The plaintiff, for herself and her two children, claims emancipation under the will of their former owner, whose testamentary executor and heir the defendants are. She also claims damages. The answer resists the claim on the ground, that in order to obtain the consent of the police jury to her emancipation, they (defendants) must allege that she has behaved well during the four preceding years, and that she is able to provide for her maintenance, which they cannot do. It is also represented, that the children are not thirty years of age. There was judgment for the defendants, but the rights of the children to emancipation were reserved to them, the court being of opinion that the plaintiff, especially during the four years preceding her application, had been of a bad reputation, thievish, and insolent. According to the first legislation of this State in regard to emancipation, slaves of thirty years of age are alone permitted to be emancipated. Act of 9th of March, 1807. This provision is repeated in the Civil Code, art. 185. By an act of the 31st of January, 1827, slaves, under the above age, natives of this State, may be emancipated with the consent of the police jury of the parish. The petition does not allege that the plaintiff is of the age of thirty, or a native of this State; she does not, therefore, show that she may be legally emancipated. Both the act of 1807, and the Code, require an allegation and proof of the good behavior of the slave, during the four preceding years. The act of 1827 does not dispense with this, but only authorizes the emancipation before the thirtieth year.

The Union Bank of Maryland v. Freeman.

The petition, therefore, does not present a case in which a legal emancipation can be decreed. As to the children, the record does not inform us whether their emancipation is claimed under the act of 1807 and the Code, as being thirty years of age, or under the act of 1827, as being natives of this State. The District Court reserved their rights, and this is all they could expect. The testimony shows, independently of this, that the mother's behavior during the four years preceding her application, would alone have prevented her emancipation.

Judgment affirmed.

THE PRESIDENT AND DIRECTORS OF THE UNION BANK OF MARYLAND v. THEOPHILUS FREEMAN.

Under the act of Congress of 26th May, 1790, an act of the legislature of another State can only be authenticated by affixing the seal of the State thereto.

A copy of an act of the legislature of another State, certified to have been made "from *Liber, I. G.*, one of the law records of the State, belonging to the office of the Court of Appeals," is inadmissible. A copy from the original deposited among the archives of the State, would be better evidence.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

MARTIN, J. The defendant and appellant asks for the reversal of the judgment and for one of nonsuit, and has placed the case before us on a bill of exceptions taken to the admission of a copy of the plaintiffs' act of incorporation. The document offered in evidence purports to be a copy of the act of the legislature of the State of Maryland, incorporating the plaintiffs; and its admission was opposed on the grounds, that it was not authenticated according to the act of Congress; that the certificate of the clerk of the Court of Appeals, and of the presiding judge thereof, offered no legal evidence of its being a copy; that the document purports, on its face, to be only the copy of a copy; and that a copy of the original, given by the officer in possession of it, could alone afford legal evidence.

The defendant, in his answer, had expressly denied the plaintiffs' right to sue as a corporate body. They were, therefore,

bound to produce their act of incorporation. The act of Congress of 1790, chap. 38, has an express provision directing the mode in which the public acts, records, and judicial proceedings in each State, shall be authenticated, &c. The plaintiffs' act of incorporation is an act of the legislature of the State of Maryland, not a record of a judicial proceeding in any court of that State.

The act of Congress provides "that the acts of the legislatures of the several States shall be authenticated by having the seal of their respective States affixed thereto." The plaintiffs produced a copy of their act of incorporation, which the clerk of the Court of Appeals for the western shore of Maryland, has certified to be a full and true copy of the act of the General Assembly of Maryland, of which it purports to be a copy, as taken from *Liber*, I. G., No. 4, folio 578, &c., one of the law records of the State of Maryland, belonging to the office of the Court of Appeals for the western shore of said State. The certificate is attested by the signature of the clerk, and the seal of the court is affixed thereto. It is accompanied by the certificate of the presiding judge, attesting the capacity of the clerk, and that his certificate is in due form. The clerk's and the judge's certificates would authenticate the document to which they are affixed, if it were the copy of a judicial proceeding. As the copy of an act of the legislature, it lacks the seal of the State, which the act of Congress has made an essential requisite. The document was certainly inadmissible, under the act of Congress. Under the general principle which requires, that the best evidence of which the case is susceptible shall be produced, the objection to its admission was equally strong. The copy does not purport to have been made from the original act, but from a copy thereof, entered in a book belonging to the Court of Appeals, for the western shore of Maryland. It is, therefore, clear that a copy made from the original, deposited among the archives of the State, probably kept in the office of the Secretary of State, with the seal of the State affixed thereto, would have been better evidence. Indeed, nothing could, perhaps, dispense with the impression of the seal of the State on the document offered in evidence. The judge in our opinion erred.

It is, therefore ordered, that the judgment be annulled and reversed, and the case remanded for a new trial, with directions

Jartroux v. Debergue and others.

to the judge, to require legal evidence of the plaintiffs' act of incorporation ; the plaintiffs and appellees paying the costs of this appeal.

Mott, for the plaintiffs.

R. N. Ogden and *A. N. Ogden*, for the appellant.

FRANÇOIS JARTROUX v. MICHEL DEBERGUE and others.

APPEAL from the Parish Court of New Orleans, *Maurian*, J.

MARTIN, J.* The defendants are appellants from a judgment which rescinds the sale of the undivided half of four lots of ground described in the petition, and condemns them to pay fifteen hundred dollars in damages, and to refund such sums of money as they have received on account of said sale, and the notes given, or in default thereof, their amount in money.

The rescission of the sale was sought on the ground of gross fraud in the vendors, who sold property to which, it is alleged, they had no title. The case was tried by a jury, who found the fraud, and assessed the damages at fifteen hundred dollars.

It has been urged, that the judgment is for an uncertain amount, to wit, *such sums of money* as have been received by the defendants, and that the notes to be returned are not described ; further, that the damages are excessive, and that judgment was improperly given against the defendants *in solido*.

The damages appear to us excessive, being more than treble the amount of conventional interest. As the plaintiff claimed a trial by jury, we have felt reluctant to interfere and reduce them to what appears reasonable and just. We prefer, by remanding the case, to give the plaintiff an opportunity to submit it to the decision of another jury. As this cannot be done without reversing the judgment, we have not examined the other objections made to the verdict and judgment appealed from.

Schmidt, for the plaintiff.

Grymes, for the appellants.

* MORPHY, J., having been of counsel, did not sit on the trial of this case.

SAME CASE—ON A RE-HEARING.

BULLARD, J. This case is before us on a re-hearing. It appeared to us, on the first argument, that the verdict and judgment for \$1500 damages, besides the reimbursement of what the plaintiff had paid, and the cancelling of his notes yet remaining unpaid, was unsupported by evidence ; but instead of reforming the judgment, as we had authority to do, the case was remanded for a new trial. The appellee urges us to pronounce such judgment as we think ought to have been given below, and offers to enter a *remittitur* for the whole amount of damages.

To this course we see no objection, being of opinion that the judgment is, in other respects, supported by the law and evidence.

It is therefore ordered, that the judgment, so far as it condemns the defendants to refund the sums received by them, and to return the notes given, be affirmed with costs, and that, as it relates to the damages of \$1500, it be reversed ; and that the plaintiff pay the costs of the appeal.

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LAURENT MILLAUDON v. THE NEW ORLEANS AND CARROLLTON
RAIL ROAD COMPANY.

THE NEW ORLEANS AND CARROLLTON RAIL ROAD COMPANY v.
LAURENT MILLAUDON.

The act of incorporation of a banking company provided that its capital should be divided into shares of one hundred dollars, of which five dollars should be paid at the time of subscribing for the stock, and the residue in such instalments, and at such times, as might be required by the Directors. Fifty dollars on each share were called in, and paid. A resolution, subsequently adopted by the Directors, provided, "that any stockholder who shall pay in anticipation a part, or the full amount due on the stock held by him, shall be entitled to dividends thereon in proportion to the amount so paid in." Under this resolution, a stockholder paid up the whole amount due on the stock held by him, and received dividends thereon, and loans (less, however, than the amount so advanced by him) upon the pledge of it. The Bank having gone into liquidation, required the re-payment of the loan, and refused to call

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for further contributions from the other stockholders. An action was commenced by the stockholder who had paid in full against the Bank, to compel the calling in of the whole amount subscribed, or, in default thereof, or in the event of the inability of the stockholders to pay the balance due, to recover the amount paid by him beyond fifty dollars on each share, with interest on the over-payment, and to restrain the Company from exacting re-payment of the loan made to him, until the stockholders should be placed on an equality as to their payments. The Bank, thereupon, sued on the notes given for the loan. On appeal from a judgment rendered in the two actions, which had been consolidated: *Held*, That no stockholder can be liable for more than one hundred dollars on each share held by him, and that each share must lose an equal amount on the final liquidation of the Bank. That if the whole capital be sunk, those who have paid but fifty per cent will be debtors for the balance, and those who have paid in full cannot be called on for more. That if but half have been lost, the former are no further liable, but a balance will be due to the stockholder who has paid in full. That the payment of the whole amount of the shares under the resolution of the Directors, did not change the relative position of the stockholders to each other as partners, except as to the dividends, the one having merely anticipated the payment of all he could ever be called on to pay, and the others remaining liable for the balance of their subscriptions. That the payment was under the tacit condition that, if the concern proved profitable, the party so paying should receive dividends in proportion to the amount paid by him, and on the winding up of its business, after payment of the debts from the surplus profits, the whole amount so paid in; and, if not profitable, that he should lose only the same proportion, upon each share, as the other stockholders. That *quoad* the creditors of the Bank, the excess above fifty per cent so paid in is capital, liable for its debts; but that, as among the stockholders, the party who made the advance is a creditor to the extent of the surplus, and entitled to interest thereon from the time when the Bank ceased its operations. That the stockholders are liable for the whole amount of their subscriptions, and that, if any further payment beyond fifty dollars on each be necessary to the discharge of the debts of the Company, it will be the duty of the Directors to call on all the stockholders for an equal contribution; and that it would be unjust to use the amount paid by one stockholder, beyond the others, for that purpose. That the Bank having gone into liquidation, a stockholder may maintain an action against it; and that the loan, being less than the amount advanced by the borrower beyond the other stockholders, may be retained by him, unless required for his proportionate contribution towards the payment of the debts of the Company.

The property of a partnership is common, held *pro indiviso* by all the partners, responsible for the debts of the concern, and subject, after their payment, to division among the partners, according to their agreement. Each is a debtor for what he promises to bring in; and if one have brought in more than the rest, he is a creditor of the partnership for the difference, and, as between the partners, has a right of retention on the common stock for its repayment, and for any debt of the partnership for which he may be made responsible.

The liability of the stockholders in the New Orleans and Carrollton Rail Road Company under their subscriptions, is not affected by the act of 14th March, 1839, relieving the Banks from the forfeiture of their charters. If a further call upon those who have not paid in full, be necessary for the discharge of the debts of the Company, the Directors are authorized to make it.

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ON the third of April, 1841, Laurent Millaudon presented a petition to the Parish Court of New Orleans, alleging : That the corporation created by an act of the legislature of 9th February, 1833, under the name of the New Orleans and Carrollton Rail Road Company, was, by an act of the 1st April, 1835, invested with banking privileges, and authorized to increase its capital from three hundred thousand dollars, as fixed by the original charter, to three millions. That the additional capital, like the first, was divided into shares of one hundred dollars each, on each of which five dollars was to be paid on subscribing, and the remainder in instalments, as directed by the second section of the original act. That he is a stockholder in the Company, to the amount of two hundred and seventy-eight thousand five hundred dollars. That by the second section of the act of the 1st April, 1835, five offices of discount were established in different parts of the State, with an aggregate capital of one million four hundred thousand dollars. That by a subsequent act, of the 1st of March, 1836, it was provided, (sect. 2,) that one-fourth of the capital of the branches should be furnished within six months from that date, and the remainder as the capital of the Bank should be paid in, but in such manner that the branches should receive one-half of their capital within sixteen months, and the residue within twenty-four months from the passage of the act ; and that it was contemplated, both by the legislature and stockholders, that the whole capital subscribed for the purpose of carrying into operation the banking privileges granted by the act of 1st April, 1835, with that subscribed in the first instance, should be paid on or before the 1st of March, 1838 ; and that it was the duty of the Directors appointed to manage the affairs of the Company to have called it in by that time. That the petitioner, and those under whom he holds such portion of his stock as was not comprised in his original subscription, with other stockholders, believing that the affairs of the Company would be conducted in conformity to the spirit of the laws by which it was created and its duties and privileges were regulated, paid up in full, previous to the 1st of March, 1838, the amount of the shares for which they had subscribed. That notwithstanding his repeated appeals to the Directors to call in the balance due on the stock, fifty per cent of the whole amount subscribed has remained un-

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called for, to his great injury. That the Company, by calling in the whole of the capital, might have carried on a large business; and have realized great profits, while, by its neglect to do so, it has subjected itself to continual embarrassments and large losses, in consequence of which the stock has been greatly depreciated. That the course pursued by the Directors of the Company, has rendered it necessary to reduce the loans made to him on a pledge of his stock; and that this reduction falls with greater weight on those who have paid the whole amount of their subscriptions, as no allowance has been made for the excess of their payments over those of the other stockholders, and interest on such excess has been refused to them. That on the refusal of the Directors to call in the remaining amount due from the other stockholders, equity required that those who had paid up the whole of their subscription should have been permitted either to withdraw the excess thus paid in, or to claim interest, at the rate charged by the Company on its loans, from the 1st March, 1838.

The petitioner further alleges, that he has, at different times, applied to the Company, demanding that the whole stock should be called in, and all the stockholders placed on an equal footing; that no reduction upon the loan made on his stock should be exacted from him, so long as the over-payment on his subscription should be sufficient to cover the amount of the loan, and the other stockholders be allowed to delay the payment of the balance due on their subscriptions; that, in case the remainder of the stock should not be called in, the excess paid by him should be refunded; and that the Company should pay him interest on such excess, at six per cent a year, from the 1st of March, 1838, (at which time, he alleges, it was contemplated that the whole amount subscribed for stock would have been paid in,) which interest amounted, on the 1st of March, 1841, to \$29,065.

The petition concludes by praying for a judgment, ordering the whole amount of the stock subscription to be called in immediately; or in default thereof, or in the event of the inability of the stockholders to pay the balance due, directing \$139,250, the excess paid by him, to be refunded; and allowing him \$29,065, for interest on such excess, due on the 1st March, 1841, and restraining the Company from requiring any reduction on the loan

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made to him, until all the stockholders be put on an equal footing. There was the usual prayer for general relief.

On the 30th April, 1841, the defendants answered. They pleaded a general denial, acknowledging their existence as a corporation under the acts of 1st April, 1833, 1st April, 1835, and 1st March, 1836, and the fact of Millaudon's being a stockholder, or holding stock in his name, to the amount of two thousand seven hundred and fifty shares. They aver that so far as the shares held by the petitioner have been paid in full, the payments were voluntary on his part ; that they were made under a resolution of the Board of Directors, to which Millaudon was a party, by which it was provided, that any stockholder who should pay, in anticipation, any part, or the full amount due on the stock held by him, should be entitled to a dividend thereon in proportion to the amount so paid in, provided that no dividend should be made on any instalment which should not have been paid in more than three months previous to the declaration of such dividend ; and that since such payments were made by the petitioner, he has received a dividend on the whole amount so paid in by him, whenever any dividend has been declared by the Directors, besides other benefits and advantages from such payments. It is further alleged that Millaudon has been for many years, and was anterior to such payments on his stock, a Director of the Company ; that he was cognizant of, and a party to the acts of the Board of Directors to whom the administration of the affairs of the Company was entrusted by the charter, and is bound thereby ; and that his acts as a stockholder and Director, are contrary and repugnant to the claims and demands set up in his petition. The defendants conclude with a prayer for a judgment in their favor, &c.

In a supplemental petition filed on the 27th May, 1841, Millaudon further pleads, in case the court should be of opinion that the Board of Directors were authorized to limit the calls on the stockholders under their subscriptions, to the amount already paid in, and that the stockholders were not bound to complete their subscriptions to the full amount, before 1st March, 1838, that the excess of payment made by him was made in error, and that he is entitled to reclaim the same, with interest at six per cent a year,

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during the time for which the Company had the use of such over payments.

On the day on which the Company filed their answer to Millaudon's petition, they commenced an action against him, representing that he was indebted to them in the sum of \$82,650, the amount of five promissory notes, executed by him, and secured by a pledge of stock of the Company, a copy of which act of pledge was annexed to their petition. Their petition prays for judgment for the amount of the notes, with interest from their maturity, at six per cent a year, with a privilege of pledge upon the stock by which the payment of the notes was secured.

In answer to this petition, Millaudon acknowledged his execution of the notes, and set up in defence the matters alleged in the petition filed in his action against the Company.

The second section of the act of 9th February, 1833, incorporating the Company for the purpose of constructing the Rail Road, declares :

"That the capital stock of said Company shall not exceed three hundred thousand dollars, divided into shares of one hundred dollars each share, and payable in such instalments, and transferable in such manner, as shall be provided by the by-laws of the Company ; and that upon each and every such subscription there shall be paid at the time of subscribing, five dollars on every share so subscribed, and the residue thereof shall be paid in such instalments, and at such time, as may be required by the President and Directors of said Company ;" &c.

By the act of the 1st April, 1835, which amended the charter and conferred the privilege of banking, it is provided (sect. 1.) :

"That the capital stock of said Company be extended to the sum of three millions of dollars, inclusive of the sum of three hundred thousand dollars fixed by the original charter of said Company, and that such additional capital stock shall be divided into shares of one hundred dollars each, and payable in such instalments, and transferable in such manner, as shall be provided by the by-laws of said Company ; and that upon each and every such subscription there shall be paid at the time of subscribing five dollars on every share so subscribed, and the residue thereof shall be paid in such instalments, upon such notice, under such penalties

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and such provisions, as are set forth with regard to subscriptions to the original stock of said Company, in the second section of the original act of incorporation thereof."

A subsequent section of this act provides for the establishment of five branches, with certain capitals mentioned in the act.

By an act of the 1st March, 1836, further amending the charter, it was declared (sect. 2.) :

" That one-fourth at least of the capital of the branches, shall be furnished within six months from the passage of this act, and the remainder in proportion as the capital of said Bank is paid in ; *provided*, said branches shall receive half of their capital within sixteen months, and the whole within twenty-four months ; and in case said branches do not yield a nett profit of six per cent per annum, then and in that case, they or either of them may be withdrawn twelve months after said branches shall have received the whole amount of their capital."

The two cases were consolidated, and tried together. It was proved, that Millaudon owned two thousand seven hundred and fifty shares of the stock of the Company, which had been paid for in full ; that certain other stockholders, had paid in full ; that those who have not paid in full, have paid but fifty per cent on each share ; and that the last call on the stockholders for payments under their subscriptions, was made by the Board of Directors on the 19th April, 1836, to complete the fifty per cent.

The resolution of the Board of Directors, under which Millaudon paid his stock in full, was adopted on the 13th May, 1836, and is in these words :

" Resolved, that any stockholder who shall pay, in anticipation, a part, or the full amount due on the capital held by him, shall be entitled thereon to dividends in proportion to the amount respectively paid in ; provided that no dividend shall be made or received in favor of any instalment, which shall not have been paid in more than three months prior to the declaration of such dividend."

Nicholson, the cashier of the Company, testified, that he was generally present at the meetings of the Directors ; that the question of calling in the whole capital was often agitated before the Board ; that Millaudon was always desirous of having it done ; that considerable amounts of the stock of the Company had been

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transmitted to Europe for sale ; and that stocks not paid in full cannot be sold in the European markets. It was proved, by other evidence, that Millaudon had urged the Directors to call in the balance due on the subscriptions. The Company also, offered evidence of the dividends which had been paid to Millaudon, and to the former owners of part of the stock held by him. It was admitted that the Bank was in a state of liquidation.

The Parish Court, *Maurian*, J., gave a judgment in favor of Millaudon for \$137,500, the amount paid by him above what had been required from the other stockholders, with legal interest from judicial demand (3d April, 1841,) until paid ; and in favor of the Company for \$82,650, the amount of the notes sued on by them, with interest at six per cent from maturity ; the one sum to be deducted from the other, the difference to be the amount due to Millaudon by the Company. The latter were condemned to pay the costs, and have appealed.

T. Slidell, for the appellants. The petitioner prays that the whole stock of the Company may be immediately called in, and all the stockholders ordered to pay the fifty per cent remaining due on their subscriptions.

The first section of the charter of 1835 provides, that upon each and every subscription there shall be paid, at the time of subscribing, five dollars on every share so subscribed, and the residue thereof in such instalments, upon such notice, and under such penalties and such provisions, as are set forth with regard to subscriptions to the original stock of said company in the second section of the original act of incorporation. The second section referred to provides, that the stock shall be divided into shares of \$100 each, payable in *such instalments*, and transferable in such manner, as shall be provided by the by-laws of the Company ; and that upon each and every such subscription there shall be paid, at the time of subscribing, five dollars on every share, and the residue thereof, in such instalments, and at such time, *as may be required by the President and Directors of said Company*. If the above provisions, which are the only distinct and positive ones in the charter, be interpreted by themselves, it is indisputable that the calling in of the stock is left entirely to the discretion of the cor-

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poration itself. The words are plain, and susceptible of but one construction.

But it is contended by Millaudon, that a contrary interpretation impliedly results from other provisions of the charter. An implication in one part of an instrument, to control a clear and distinct enunciation in another part of the same instrument, must, to say the least, be *direct, certain* and *irresistible*. The provisions of the charter upon which the counsel for Millaudon relies, are not of such a character. From the facts, that, by the second section of the act of 1835, offices of discount were established at five different places in the State, with an aggregate capital of one million four hundred thousand dollars, and that by a subsequent act of the legislature, (act of 1836, sect. 2,) it was provided that one-fourth of the capital of the branches should be furnished within six months from the passage of the act, and the remainder in proportion as the capital of the Bank shall be paid in, provided that said branches shall receive one-half of their capital within sixteen months, and the whole within twenty-four months, the conclusion is attempted to be drawn that it was in the contemplation of the legislature and of the stockholders, that the whole capital subscribed for putting into operation the banking privileges granted by the act of 1835, together with the capital originally subscribed, should be paid in full before the 1st March, 1838. Is this conclusion *direct, certain, and irresistible*?

The history of the bank charters granted by the legislature of this State shows, that when such charters have been granted to the citizens of New Orleans, the grant has been usually accompanied by provisions for the real or supposed advantage of the country parishes ; and that it has been usual to exact a *bonus* for the benefit of the country parishes under different forms—sometimes in the shape of branches of discount and deposit, sometimes of loans to the country parishes or districts, sometimes in the shape of an absolute advance towards the construction of a rail road or bridge, or other improvement ; and perhaps of all the charters so granted, not one contains so many onerous provisions of this nature as the charter now under consideration. These were not provisions for the benefit of stockholders, but for the benefit of the

parishes. They were stipulations *pour autrui*, both practically and in a technical sense. The very charter under consideration contains the strongest internal evidence of our position; for the second section of the act of 1835, requiring the establishment of five branches or offices of discount and deposit, contains the following clause: "*Provided*, that the capital of the aforesaid branches be called for by the several parishes entitled to the same, within three months after their establishment." So, in the third section of the same act, the legislature, apprehensive that the burden imposed on the Company might be too heavy to be borne, declared, that "the mother Bank may withdraw any of said branches after two years, if they do not yield a nett interest of five per centum per annum."

The provision in the third section of the act of 1836, is a stipulation for the benefit, real or supposed, of the country parishes, exacted by way of *bonus* from the corporation, and to be fulfilled within a specified period. Can it, then, be contended, if the Bank should find ways and means to furnish the capital to the branches, without calling in the whole of its capital, that it could not lawfully do so? Who could complain? Not the State, for the obligation of establishing the branches for the benefit of the parishes, would have been fulfilled. Not the parishes, for they would have received all that the bounty of the legislature intended they should get. Not the stockholders, for they had confided the administration of their affairs to the Board of Directors, elected by themselves, and whose members are identified in interest with them. If the capital had not been advanced to the parishes for whose benefit the stipulation was made, could they not, at the expiration of the period, by legal proceedings, have compelled the advance? This interpretation, for which we contend, makes the several parts of the charter harmonize, and does violence to none. The interpretation claimed by Millaudon requires, that an *implication*, remote in its character, and unnecessary to give effect to any part of the charter, shall repeal the clear and unequivocal enunciation of the legislative will, expressed in the plain language of the second section of the original charter, and repeated in the first section of the new charter. *Ut res magis valeat quam pereat*, is a sound principle of interpretation. Our position gives effect to the whole

law. The forced *implication* of our opponent strikes out one of its plain and reasonable provisions, and wrests from the Board of Directors, without necessity, the grant of the power of calling in the instalments at such time, and in such manner, as the wants and interests of the institution might suggest or require.

“Laws *in pari materia*, or upon the same subject matter,” says the Civil Code, (art. 17,) “must be construed in reference to each other ; what is *clear* in one statute, may be called to explain what is doubtful in another.” Here the effort seems to be to reverse the principle, and to *invoke what is doubtful for the destruction of what is clear*.

Millaudon further prays, “that in default thereof, (i. e. of calling in the balance due on the stock,) or in case of inability of the stockholders to pay the residue of their subscription, the surplus paid by him, to wit, the sum of \$139,250, may be refunded.”

The minutes of the Bank show that the over-payments by Millaudon were gratuitously made, under the permission granted by the resolution of May 13th, 1836. Whether Millaudon, like others, did this for the purpose of facilitating his sales in Europe, or in the hope of frequent dividends, or for any other reason, it is certain that *he paid voluntarily, that he has received dividends on the excess of fifty per cent, and that for four or five years he has had large stock loans on the excess*. Is he to reap all these benefits from a privilege accorded by a resolution of the Board of which he was a member, and now, when adverse circumstances have reduced the value of the stock, to be permitted to recall one half of his instalments? *Qui sentit commodum, sentire debet et onus*.

The fact that Millaudon's over-payments were *voluntary*, and that he has been benefited in the shape of dividends and stock loans, will satisfy the court that the claim of interest is untenable. The interest spoken of in the 18th section of the act of 1835, relates to the old stock only ; and cannot, without palpable violence to the charter, be applied to the new stock. The English text is plain, though the French text has been rendered unintelligible by careless translation.

Millaudon also demands, “that the Company be restrained from requiring any reduction on the loans made to him on a pledge of

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his stock, until all the stockholders be put on an equal footing with himself."

If there be any inequality, it is the result of his own voluntary acts, with a view to his own benefit and convenience. While the Bank was prosperous, he received his dividends, and has had stock loans on the whole amount paid. He is the partner of the other stockholders. The Bank *quoad* its stockholders, is really a partnership. Millaudon voluntarily put in twice the amount contributed by his associates. While the Company prospered, he received his *pro rata* of profits ; now that its situation is changed, he demands back half of what he contributed to the capital of the partnership, without the indispensable preliminary of a *liquidation of the partnership affairs*, and the payment of the partnership liabilities. The liquidation of the partnership affairs, is an indispensable preliminary to the withdrawal of his capital by any partner. "Nothing," says this court, in the case of *Faurie v. Millaudon*, 3 Mart. N. S. 476, "is more clear than that the acting partners are not accountable to the others, much less to a number of them, even the majority or more, for any particular transaction singly, nor any number of transactions, but only for that balance which, after a settlement of accounts, shall appear due." Again, in the same case : "A partner has no action against another, except to make him account, until a final settlement takes place, and then for the balance that appears." "A partner has no right to be paid until all claims against the partnership are discharged." If these principles be true as to ordinary partnerships, with how much greater force do they apply to an incorporated banking institution ? The very amount furnished by Millaudon, by his voluntary contribution, formed an important portion of the capital, on the faith of which the Bank issued its promissory notes, and the public accepted them as a currency. This capital is the pledge of its creditors. Should the judgment which Millaudon has obtained be affirmed, he will sell the assets of the Bank, and though himself a debtor of the public *quoad* his stock, will be paid before his own creditors.

Eustis, on the same side. The first question which the case presents is : Were the Directors bound to call in the whole nominal

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amount of the stock ? Is any such duty or obligation imposed on them by the charter ?

On the mere construction of an instrument, little can be offered to a court like this, by way of argument. Thoroughly familiar with the principles of law relating to the subject, their application is an easy task. The court, however, may derive some assistance from explanations.

It may, at first, be considered singular, had the legislature intended that the whole capital should be paid in within a given time, that it did not so provide in express terms. So far from this being the case, the second section of the original act, which provides for the capital stock, its payment, and its terms, provides for the very reverse. "The residue thereof," says this section, "shall be paid in such instalments, *and at such time*, as may be required by the President and Directors of said company." The payment of five dollars was exacted, in cash, *at the time of subscribing* ; and the *period for the payment of the balance*, was left to the discretion of the Board of Directors. If this be not a positive enactment as to the time of payment, it would be difficult to make one.

Is there any thing in the charter, or in the amendments, which annuls or repeals this positive enactment as to the time of payment ? It is contended that there is, and that by the second section of an act amendatory of an act amending the charter, this important and substantive provision is destroyed. It must be borne in mind, that the mode of payment, prescribed in the charter, is re-asserted and preserved, by an express enactment in the amending act.

In the first section, providing for increasing the stock, it is said, that it shall be *payable in such instalments* as may be prescribed by the by-laws of the Company.

The first charter was granted in 1833, for making the Rail Road. The additional act creating the Bank, and re-enacting the clause concerning the time of payment of the stock, was passed in 1835 ; and the amendatory act, containing the clause relative to furnishing capital to the branches, was enacted the year after, in 1836.

The objection to construing the provision concerning the branches as repealing this express and twice enacted fundamental clause, upon

all principles of sound construction, is well taken. The charter, amendments, and supplements, must be taken as one whole, and effect given to every part. A fundamental provision, like the one under consideration cannot be repealed by mere *implication*. The implication must be sacrificed rather than the *twice-enacted* clause.

It is clear, from all the enactments, that the furnishing of capital to the branches, was a part of the *bonus* given in lieu of a forfeiture, (which had been remitted by the previous section,) and that the attainment of this object was the intention of the second section, which provided for the payment of the capital to the branches, and did not purport to treat of, or make any change in the time fixed for the payment of the capital stock. The branches were entitled to have their capital, one-half in sixteen, and the other half in twenty-four months. But should the Bank provide the branches with capital from any other source, the payment of the capital would always be a question of administration resting in the discretion of the Directors. The terms fixed for furnishing capital to the branches can, in no sense, be considered as repealing two positive enactments, concerning another subject, to which the clause refers as a mean and not as an end.

The furnishing of capital to the branches, was not necessarily dependent on the payment of the stock in full. The capital might have been furnished from profits, or from voluntary payments on stock, like that by Millaudon. Had several of the large stockholders paid their stock in full, there would have been ample means to supply the exactions of the charter in favor of the branches, without any general call on the stockholders. The general contribution is, therefore, not indispensable, under the charter, to the attainment of the end.

But the prayer of Millaudon *is not that the capital be furnished to the branches* ; and the court can in no event order the stock to be paid up, without giving to the funds the direction which it is contended the charter requires.

The demand to withdraw any portion of the capital stock of a corporation, voluntarily and lawfully paid in pursuance of the provisions of the charter or by-laws, is entirely inadmissible. It is evident that the payment of the whole amount of the stock by some

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of the corporators was within the intendment of the charter, for, besides other provisions, the 18th section of the act of 1835, expressly commands the payment of the dividends in proportion to the amount paid in.

If a partner lend money to a partnership, he undoubtedly becomes a creditor for that amount; but it is an error to confound such a case with the one under consideration. By this partnership, if it be one, each of the partners was at liberty to increase his interest to a certain amount, and was entitled to receive his proportion of profits accordingly; but having established his interest, and received his share of profits, by what provision of the charter, or on what principle of law, can he diminish it at pleasure, during the existence of the partnership?

The claim for interest is untenable. Interest can only be allowed in cases provided for by law. The interest allowed by the 18th section of the act of 1st April, 1835, is to be paid on the old stock—on instalments paid *previous to the opening of the new books*, and for any excess over those to be paid under that act. If those who should pay their stock in full under the new subscription, were entitled to interest in addition to dividends, provision would have been made for so important a privilege. It would not have been left to conjecture or implication.

The loans made to a stockholder, from the very nature of banking institutions, must be punctually paid, according to the regulations of the Bank, by which he, as a corporator, is bound. He cannot deviate from rules which he has himself prescribed for his own direction. Any other course leads to the very destruction of the object of the partnership.

Nothing but confusion can result from permitting a stockholder to set up matters which relate to the corporators *inter se*, against a loan received by him, and which is payable directly to the corporation. Is there any authority for this? Has such a right ever been recognized by a court? Is there any principle of law which countenances it?

Soulé, contra. The counsel for the Bank have brought into the debate a question not raised by the pleadings, and which could only have been presented in the shape of a peremptory exception.

It is contended that the suit brought by Millaudon cannot be

maintained, so long as the Bank has not proceeded to a complete liquidation. This position is untenable. I have attempted to show, that no other portion of the capital paid in by Millaudon can be considered as a component part of the partnership or banking fund, than that which corresponds to the capital called in by the Board. Indeed, if the rules laid down by all writers on partnership be adhered to—if a perfect equality be the fundamental principle of every commercial association, and particularly of an anonymous partnership like the one created by the charter of the Carrollton Bank, it will hardly be denied, that no one of the partners can be bound to contribute towards forming the general fund in a greater proportion than the rest. Thus, although, like all others, such partner may remain liable towards third parties to the whole extent of the capital subscribed, yet, as between the partners themselves, he will be to all intents and purposes a creditor of the common fund, for any surplus he may have paid above the amount demanded from the other stockholders or co-partners.

A stockholder in the situation of Millaudon presents a stronger case, on account of the peculiar situation of the Carrollton Bank, and the effect produced by the act of 1839 on its capital. The Bank, it is admitted, has gone into liquidation, and no other call for capital will hereafter be made on the stockholders. Besides, by the 2d section of the act of March 14th, 1839, the stock of the Banks which had then forfeited their charters by suspending specie payments, was limited to the amount which should be called in on the 1st of February, 1841; and the limitation is so absolute, that the Banks are precluded from acting on a larger amount of capital than that which may have been paid in at that period. It is thus clearly shown that, up to this day, but fifty per cent of the capital subscribed has been called in; and whatever excess may have been paid by anticipation, ceases to be a portion of the capital of the Bank. It could not be otherwise without a flagrant violation of the rule, that the most perfect equality shall exist between all the partners or stockholders.

The court below refused to allow the interest claimed. The 18th section of the act of 1835, allows it on any excess paid in advance by any stockholder.

The excess of capital paid by Millaudon, is no more a part of

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the stock, than the portions remaining unpaid by the other partners. Such excess creates a debt against the partnership in favor of the partner who paid it, in the same manner as any deficiency on the part of any partner or stockholder, creates a debt against him in favor of the partnership.

BULLARD, J. We may assume it as undoubtedly true, that no stockholder can be liable for more than a hundred dollars for each share holden by him ; and that each share is to lose an equal amount on a final liquidation of the Bank. Hence, if the whole capital shall be found to have been sunk, those who have paid but fifty per cent will remain debtors for the balance of their subscription, and those who have paid up entirely cannot be called on for any more. If, on the other hand, it should turn out that there is a loss of fifty per cent, of the stock subscribed, then those who have paid up that amount are no further liable ; but there will remain a balance in favor of those who have paid up in full, unless it be admitted that one share is to lose more than the others. If Millaudon were now garnisheed by the creditors of the Bank, he might defend himself by showing that he had paid up all he was bound to pay. If a stockholder, who had paid but fifty per cent, were sued, he would be liable towards the creditors of the institution for the balance of \$50 per share. These appear self evident propositions. When Millaudon paid his shares in full, he did not suppose that he was to lose more on each share, ultimately, than any other stockholder. His position, relatively to the other stockholders, as partners, was unchanged, in our opinion, except as to the occasional dividends which he was entitled to draw in proportion to what he had paid in. Each still remained liable for the amount of his original subscription, and for neither more nor less. The only difference was, that Millaudon had anticipated the payment of all he could ever be called on to pay as a stockholder, necessarily, we think, under the tacit condition, that, if the concern should prove profitable, he should receive dividends of profits *a pro rata*, and, on the winding up of the concern, after the payment of its liabilities out of the surplus profits, that the whole capital stock which he had paid should be refunded to him ; and, on the contrary, if the Bank should meet with disasters, that he should lose the same proportion upon each share, as the

other stockholders, and no more. If this be not true, then the original terms and conditions of the association have been materially changed from what they appear by the charter. According to the charter, each subscriber became liable and interested in proportion to his number of shares, and was to share in the profits and losses in that proportion. The resolution of the Board, under which Millaudon paid in full, contains only the condition, that he should receive dividends in proportion to the sum paid in. Can it be imagined that another condition is implied or understood in that resolution, to wit, that if the affairs of the Bank should prove disastrous, Millaudon should lose double the amount lost by the other stockholders; that he should lose the whole and the others only one-half of their subscription—of the capital which each stockholder engaged to put in? Such a construction of that resolution would be a very forced one, and involve the monstrous incongruity of one stockholder losing on the final settlement of the affairs of the Bank twice as much as another, merely because he had paid up his stock in advance.

Such are the principles which apply, as among the stockholders themselves—as between Millaudon and his co-corporators. They are the elementary principles of the law of partnership, stripped of all technical phraseology, and are to be found in the various authors who have treated on the subject. Some of them have been referred to by the counsel for Millaudon. Pothier considers it of the essence of the contract of partnership, that the parties should propose to make profits, in which each shall participate in proportion to what he has brought into the concern. He considers each as a debtor to the partnership for what he had promised to bring in. It results from this principle as a necessary corollary, that if one partner has brought in more than the others, he is a creditor of the partnership for the difference. Pothier, *De Société*, No. 12.

It is true that all the funds paid in, and all the property acquired form partnership stock, and, as it relates to creditors, stand as a pledge for the payment of all liabilities to the public. "Each partner," says Judge Story in his *Treatise on Partnership*, "has a specific lien on the present and future property of the partnership, not only for the debts and liabilities due to third persons, but

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also for his own amount or share of the capital, stock, and funds, and for all moneys advanced by him for the use of the firm, and also for all debts due to the firm for moneys abstracted by any partner from such stock and funds beyond his share." Sect. 97.

The language of Bell in his Commentaries on the Scottish law, which sprang from the same fountain with our own, is very pithy and cogent on this subject. "The property of the company is common, held *pro indiviso* by all the partners as a stock and in trust, responsible for the debts of the concern, and subject, after the debts are paid, to division among the partners *according to their agreement*. This is a great point in the doctrine of partnership, and important consequences are deducible from it. The common stock includes all lands, houses, ships, leases, commodities, money—whatever is contributed by the partners to the company uses. It comprehends, also, whatever is created by the joint exertions of the company, or acquired in the course of the employment of their capital, skill, and industry. All this, by the operation of law and the nature and effect of the contract, becomes common property ; is held by all the partners jointly for the uses of the partnership, and is directly answerable as stock for the payment of its debts." "The stock, or common fund, is held by the partners *pro indiviso*. This *pro indiviso* right implies, as between the parties themselves, a right of retention in each partner over the stock, for any advances which he may have made to the company, or for any debt due by the company for which he may be made responsible. It also implies, in relation to the public at large, creditors of the company, a trust in the several partners, as joint trustees, for the payment, in the first place, of the debts of the company." 2 Bell, 613.

There is an obvious distinction between the rights of the stockholders, *inter se*, and their rights and obligations in relation to the creditors of the Bank. We have found no difficulty in coming to the conclusion that, although in relation to the public, all the funds of the Bank, including what was paid in by Millaudon over and above what was paid by other stockholders, may be liable as stock to the creditors of the Bank, yet that, after their debts are paid, he would be entitled to receive double the amount which would be coming to the others. And this brings us to the inquiry,

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whether the plaintiff be entitled, *at this time*, to withdraw what he has overpaid, or how far he may invoke the aid of the court to coerce such an administration on the part of the defendants as will secure his eventual rights, and maintain that equality in the contingent liabilities of the stockholders, which equity, as well as the charter, requires. And before entering into this part of the case, it may be premised that, as a consequence of the principles above stated, if it were now ascertained that the loss sustained by the institution would not exceed fifty per cent, Millaudon would be entitled, at once, to recover the excess paid by him on that amount. It is true that, if the Bank were yet in operation as such—if its capital were yet employed in banking, such an action would be premature; but it is admitted that the institution is in the progress of liquidation, having acceded to the terms of the act of the last legislature for that purpose. In liquidating the concerns of the Bank, the Board of Directors become the mandataries of the stockholders for that purpose, and the trustees of the creditors of the Bank. Their duties result from this twofold relation towards the stockholders and the public. They can declare no more dividends, nor subject the stockholders to any new liabilities. They are so to husband the resources of the Bank, as to meet all its existing liabilities, and preserve for the stockholders as much of the capital as possible. If, for the purpose of paying debts, a further call upon the stockholders who have not paid their subscriptions in full, should be necessary, we do not doubt the authority and obligation of the Directors to make the call. The act of 1839, upon which the counsel for the Bank rely to show that no further contribution can be required, we think does not diminish any of the original liabilities of the stockholders, and that they still remain contingently liable for the full amount of their subscriptions; but that, for purposes of banking, the capital stock, as it stood in March, 1840, was not to be changed. But if a loss should be ascertained, for example, of sixty per cent on each share, the Directors are authorized to call in ten per cent from those who have paid but fifty, and to employ, for the purpose of paying the loss, ten dollars per share of the stock paid in full by Millaudon. Equity forbids that, in such a contingency, the whole amount paid by Millaudon should be used in paying the

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deficit, and that he should be turned over to his action against each stockholder to be reimbursed what he may have paid over his share. In a direct action by a creditor against the Bank, that fund would undoubtedly be a Bank fund, liable to execution, because, *quoad* the creditors, it is capital stock; but it does not follow that the liquidators of the institution would be justified in desisting from calling upon the other stockholders to contribute their share, and in employing what, as between themselves, belongs to Millaudon, in paying a common debt.

The application of those principles to the cases before us is not free from difficulty. The two cases were consolidated. In the first, in which Millaudon is plaintiff, he shows that he is the owner of 2785 shares which have been paid in full, one half, to wit, \$139,250, over and above the other stockholders, under the resolution of the Board of Directors above alluded to. He complains that the Board has refused to call upon the other stockholders to pay the balances due by them, and thereby place all upon an equal footing, and he prays that the court would decree: *first*, that the whole stock be called in, and all the stockholders ordered to pay the fifty per cent remaining due; *secondly*, in default thereof, or in case of inability, that the surplus paid by him, to wit, \$139,250, be refunded to him; *thirdly*, that he be paid interest from the 1st of March, 1841, on said surplus; *fourthly*, that the Bank be precluded from requiring any reduction on the loans made to him on the pledge of his stock, until all the stockholders be put on an equal footing with him; and he asks for general relief.

On the other hand, the Bank sues upon sundry stock notes of Millaudon, secured by a pledge of his whole stock, and amounting in all to \$82,650; and, in his answer, the latter sets up substantially the same grounds of defence as form the basis of his direct action, and prays that the amount of the notes sued on may be compensated, by deducting so much from the amount paid by him over and besides that paid by, and required from, the other stockholders.

The Parish Court gave judgment in favor of Millaudon for \$137,500 less the amount of his stock notes, amounting to \$82,650, and interest; or, in other words, Millaudon recovered the whole

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amount paid by him over the fifty per cent originally called in, and the Bank has appealed.

It will have been perceived, from what has already been said, that this judgment would accord with our views of the rights of the parties, if it had been ascertained that the loss sustained by the institution would amount only to fifty per cent on each share, or to less ; and if the rights of the creditors, who have not yet been paid, had not been overlooked. It is liable to the further objection, that it does not reserve to the Directors the right to call back from Millaudon his proportion of stock, which may be required by the exigencies of the Bank if the losses should amount to more than the fifty per cent. It decrees a final adjustment of the matter in controversy, as if there were no debts to be provided for, or as if the creditors had no privilege on the fund, and the Directors were not in duty bound to provide for those debts.

This part of the case presents, therefore, two questions. *First.* Can the Directors, in the capacity in which they are now acting, recover on the stock notes, either absolutely or conditionally ; or, is Millaudon entitled to retain that amount, at least until it be shown that it will be required to pay the creditors ? *Secondly.* Can the court decree that any part of the capital stock shall be called in, if necessary, to pay creditors, and to maintain equality among the stockholders ?

I. Upon the first point, it appears to us, as intimated above, that, since the Bank decided upon going into liquidation, the relations between the Directors and the stockholders have undergone a material change. While the Bank was in operation, a loan to a stockholder on a pledge of stock, was, like any other loan to a stranger, liable to be called in, or its payment coerced. Even the loan in question, upon stock fully paid, could not have been exempted from such liability, upon that ground. But, at this time, the position of Millaudon, who, independently of the amount due on the stock loan, has paid more than the other stockholders, appears to us to bear a strong analogy to that of a co-heir, indebted to the estate, who cannot be compelled to pay until after a final adjustment of accounts between the heirs. The necessity for the Directors to recover this sum in order to pay debts, is not shown. Why should the common mandatary receive or require from one

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of his principals a larger amount than from another, to be employed for a common object? It is a fund which can no longer be used for any other purpose than the payment of the debts of the institution. If any more than the fifty per cent already paid in by the stockholders in general, should be required for that object, why should Millaudon's condition be rendered more onerous than that of the others? Besides the amount of the stock notes, he has, in the hands of the liquidators, \$44,850, over and above what has been advanced by other stockholders having an equal number of shares.

As among the stockholders, he must be regarded as a creditor to the full amount of the surplus advanced by him; and, as it is no longer possible to declare dividends, it is not very obvious why he should not be entitled to interest, at least since the Bank ceased to operate as such. Millaudon must be considered as having, in his hands, an amount which, as relates to creditors, belongs to the common stock, and in case of necessity must be employed in the payment of debts, but which he is entitled to retain in his hands until that necessity be shown, in the further progress of the liquidation of the Bank. The doctrine as quoted above from Bell's Commentaries, seems applicable to this case, to wit, that the *pro indiviso* right of the partners implies, as between the parties themselves, a right of retention in each partner over the stock for any advances which he may have made to the company, or for any debt due by the company for which he may be made responsible.

II. As to the question, how far the court can interfere to require a calling in of stock to meet the exigencies of the Bank, and to equalize the burden of the stockholders, we may repeat, that we consider that the paramount duty of the Board; and, if they employ in paying debts any part of the fund furnished by Millaudon over and above the other stockholders, they are bound to replace it by calling in from the other stockholders such a proportion as will put all upon an equal footing, and thus be ready to account to him for the whole surplus, if the loss should not exceed fifty dollars per share on the whole stock. If the Directors should act otherwise, and throw a disproportionate burden upon him, he would have his redress, either by an action against his mandata-

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ries, or the other stockholders. We cannot anticipate the necessity of such an application for redress, because we will presume that the defendants will act fairly and justly in winding up the affairs of the Bank. But that system of jurisprudence would be singularly defective, which should deny to the tribunals the authority to prevent anticipated wrongs, while they are competent to afford relief after their infliction. In the administration which the defendants have assumed under the statute, they are bound to take the law as their guide ; and parties interested have a right to the aid of the courts to prevent a deviation from that rule, to their prejudice.

It is, therefore, adjudged and decreed that the judgment of the Parish Court be avoided and reversed ; and it is further ordered and decreed, that in the case of the Bank against Millaudon upon the stock notes, there be judgment for the defendant, as in case of nonsuit ; and that in the case of L. Millaudon against the Carrollton Bank, there be judgment in favor of the Bank as in case of nonsuit, reserving to the said Millaudon his right to recover, after the payment of the liabilities of the Bank to others than stockholders, the amount he may have paid over and above other stockholders, so far as the same shall not have been employed in the payment of such liabilities ; and provided, that the President and Directors proceed to call in from the other stockholders, such further sums per share as shall be found necessary for the payment of the debts of the institution according to the principles recognized in this decree, if the loss should exceed the fifty per cent already paid in. And it is further ordered that the costs of the Parish Court be borne by the parties equally, and those of the appeal by the appellee.*

* *T. Slidell and Eustis*, for a re-hearing. No application is made to the court to reconsider so much of its opinion as defines the liabilities of the stockholders towards the public. Those who have paid but half their stock, it is conceded, can be called upon by the creditors of the Bank to pay further instalments, should the capital, now paid in, be insufficient to discharge the debts of the Bank. But the relations of the stockholders, *inter se*, are widely different from their relations to the public and to creditors. As among the stockholders themselves, the paying in of stock was, by the charter, left entirely to the Board of Directors. The Board never called in more than \$50 per share. But it was willing and so resolved, "that any stockholder who shall

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pay, in anticipation, a part or the full amount due on the shares held by him, shall be entitled thereon to dividends in proportion to the amount respectively paid in; *provided*, that no dividend shall be made or received in favor of any instalment which should not have been paid in more than three months prior to the declaration of such dividend." Such are the very words of the resolution of May 13th, 1836. Millaudon availed himself of this privilege.

Let us strip this case of any considerations which may entangle it, from the question being one concerning a Bank and the stock of a Bank. Such considerations are important in establishing the relations of the stockholders towards the public; but, *inter se*, the stockholders are mere partners. Let us imagine that A, B, and C associate themselves as partners in a commercial house. That, by the articles of partnership, they agree that the capital of the house shall be limited to \$300,000, of which \$100,000 is to be supplied by each partner. That they agree that each shall put in \$5,000, to commence with; and that one of the firm, elected by the vote of all, shall fix, from time to time, the amount of capital to be called in, whose decision shall be imperative upon them. That it is also agreed, that the profits shall be divided at stated periods, and that each partner may withdraw his share thereof according to the amount he has paid in. Let us suppose that A is elected to perform this duty, and let us call him the Director of the firm. The Director calls upon the partners to pay in, each to the extent of \$50,000. They do so, and in doing so fulfill all that their contract of partnership required of them. For without the call of the Director, to whose discretion the matter was submitted, none were bound to advance a dollar beyond the original \$5,000. In this state of things the partners agree that if any partner choose, without a call, to put \$50,000 more into the firm, so as to complete at once the total amount which he could be called upon in any event to advance, he may do so, and participate accordingly in the profits. B avails himself of the offer, advances \$50,000 more, and the partnership stock stands thus:

A	-	-	-	-	-	\$50,000
B	-	-	-	-	-	100,000
C	-	-	-	-	-	50,000

The business of the firm proceeds; the partnership prospers; \$100,000 of profits is realized; the period for the division of profits arrives. How is this \$100,000 of profits to be divided? Undoubtedly, like the dividends under the Bank's charter, in proportion to the amounts the partners have respectively paid into the firm. A then withdraws, for his share in the profits, \$25,000; B for his share \$50,000; and C receives \$25,000.

The business of the partnership continues, the original capital remaining in the same position. The firm loses to the amount of \$100,000. As the partnership fund was originally but \$200,000, deducting the loss there remains but \$100,000. Let us now suppose that the partners determine to go into liquidation. How is this \$100,000 to be divided? We say that it should be divided according to the amounts which the partners respectively advanced; that A and C should take one-quarter, or \$25,000 each, and that B should take \$50,000; that the profits were divided according to this standard, and that the losses should be borne according to the same rule. *Qui sentit commodum, sentire debet et onus*. But the decision in this case declares, that B shall first deduct from these \$100,000 the \$50,000 which he has put in beyond

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the other partners, and that the residue, to wit, \$50,000, shall be divided among them, one-third, or \$16,666 66 2-3, to each.

What then is the true and practical result of the application of this principle in the liquidation, *inter se*, of the partnership affairs. A put in \$50,000; his profits were \$25,000; his receipts on final liquidation are \$16,666 66 2-3; and he is thus a loser by the partnership \$8,333 33 1-3. C stands exactly in the same condition as A. B put in \$100,000; his share of profits received is \$50,000; his receipts on final liquidation are \$66,666 66 2-3. Thus estimating their relative position on the final liquidation, B has gained 16 per cent on his investment, while A and C have each lost 16 per cent.

Is there any equity or justice in this? Is it possible that, with regard to the same subject matter, Millaudon can assume two different and inconsistent positions—that, as to profits, he should be considered a partner; but with reference to losses, a creditor? that his stock should be considered in the double light of an *investment in the partnership*, and of a *loan to the partnership*? The court has improperly considered Millaudon as a creditor and not a partner, and has applied to the relations of the partners, *inter se*, principles which, though undoubtedly true as regards the creditors of the Bank, are inapplicable to the stockholders as between themselves, and must necessarily lead to unjust results. The court has decided upon the rights of the stockholders, *inter se*, though not represented. The stockholders are not parties to the suit, so far as the adverse rights of their co-stockholder Millaudon are concerned. The corporation, as such, is a party to the suit against Millaudon, as its debtor upon his stock-notes. But the stockholders, as partners, are not parties to the suit; and as the decision of this court would not form *res judicata*, as between them and Millaudon, it ought not to prejudice the question which must hereafter arise between them and Millaudon, by establishing in this case the principles which are to govern, in the future division of the residuary assets of the partnership among its members.

Re-hearing refused.

THE STATE V. THE MEXICAN GULF RAILWAY COMPANY.

A railway is not an immoveable, either by nature or destination, when the soil on which it is laid belongs to another; it is, consequently, not affected by judicial or legal mortgages, nor susceptible of being mortgaged unless authorized by a special act of the legislature.

Future property can never be the subject of conventional mortgage. C. C. 3276. The act of 12th March, 1838, authorizing certain loans to be made to the Mexican Gulf Railway Company, and other Companies, does not, of itself, create a mortgage on the property of those Companies, nor could it without their consent. That consent is expressed by the acts of mortgage, executed in pursuance of it. The act contains only a proposition to loan, upon the execution of a mortgage on the property of the Company; when accepted, the mortgage exists, and is essentially conventional. The act did not contemplate taking a general mortgage on all the property of the Company, present and future.

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APPEAL, by the defendants and certain intervenors, from a judgment of the District Court of the First District, in favor of the State, *Buchanan, J.*

BULLARD, J. The second section of the act of 12 March, 1838, entitled "An act amendatory of an act to expedite the construction of the New Orleans and Nashville Rail Road," declares, that the State engages to make a loan, among others, to the Gulf of Mexico Rail Road Company of \$100,000, provided that before receiving the bonds of the State, &c., the Company shall execute their obligation to the State for the payment of the principal and interest of said bonds, the faithful payment thereof to be secured by mortgage and privilege on all the property, slaves, machinery, &c., of said Company, to be executed as required by an act of 13th March, 1837; and provided, that before executing the notarial act of mortgage, the Governor shall name three disinterested persons, who shall, under oath, appraise the property of the Company, and show satisfactorily to the Governor and the Treasurer of the State, that the mortgage, bonds, or obligations are sufficient to secure the State against all losses. The act contains certain other conditions and restrictions, not now important to mention.*

* The act of 12th March, 1838, provides :

Sect. 2. That for the purpose of facilitating the immediate construction of the Red River Rail Road, of the Baton Rouge and Clinton Rail Road, and of the Gulf of Mexico Rail Road, the State hereby engages to make a loan to said companies of the following amounts, viz : of one hundred thousand dollars to the Red River Rail Road Company ; of seventy-five thousand dollars to the Baton Rouge and Clinton Rail Road Company ; and of one hundred thousand dollars to the Gulf of Mexico Rail Road Company ; *provided, however*, that before receiving the bonds of the State, the proceeds, or any part thereof, which proceeds are to be deposited in the Treasury of the State, the said companies shall be and they are hereby required to execute their respective obligations to the State for the payment of the principal and interest of said bonds, the faithful payment whereof to be secured by mortgage and privilege on all the property, slaves, machinery, &c. of said companies, to be executed in the same manner and effect, in every particular, as is required by the State of the New Orleans and Nashville Rail Road Company, by the second section of an act entitled "An act to expedite the construction of the New Orleans and Nashville Rail Road," approved 13th March, 1837 ; *and provided also*, that before executing the notarial act of mortgage, the Governor shall name three disinterested persons, who shall, under oath, appraise the respective property of each of said companies, and whose farther duty it shall be to satisfy the Governor and Treasurer of the State, that the respective property of each of said

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In pursuance of this act, the Company executed to the Governor, at different times, three acts of mortgage, and received the bonds of the State, which were negotiated through the City Bank. These acts declare that the Company grants a first lien, privilege and mortgage to the State, upon all the property of the said Com-

panies, and their mortgages, bonds, or obligations aforesaid, are sufficient to secure the State against all losses; *and provided, moreover*, that only ten thousand dollars of the proceeds of said bonds shall be paid over by the Treasurer of the State, for each mile of said Rail Road as soon as completed, not including that part of the Rail Road which may now be completed; *provided, also*, that the second, third, fourth, and fifth sections of the above recited act do apply to the aforesaid companies, &c.; *and provided*, that none of the provisions of the said second section [of the act of 13th March, 1837] shall affect the other Rail Road Companies mentioned in this act, except those by which the New Orleans and Nashville Rail Road Company shall be bound under this act, &c.

The act of 13th March, 1837, to expedite the construction of the New Orleans and Nashville Railroad, declares:

Sect. 2. That so soon as this act shall be accepted by said Company, evidenced by the consent of a majority in value of the stockholders thereof, and the same shall be made known to the satisfaction of the Governor and Treasurer of this State, and the President of said Company shall have executed a notarial act in pursuance of the consent of the stockholders aforesaid, in conformity with the provisions of this act, in favor of the Governor of this State and his successors in office, giving a first privilege, lien, and mortgage to the State of Louisiana upon all property of the Company, immovables, slaves, rights, machinery, lots, railways, and generally upon all property which may appertain to said Company within the limits of the State of Louisiana, which first privilege, lien, and mortgage are hereby declared legal and obligatory, all laws to the contrary notwithstanding, for the faithful payment of the principal and interest of said loan as the same shall become due, it shall be the duty of the Treasurer of this State, and he is hereby authorized and required to issue the bonds of said State, and deliver the same to the President of said Company, &c.

Sect. 3. That in case the said Company shall fail to pay the said interest when the same shall become payable, then the principal of said bonds shall be considered as due, and the State of Louisiana shall enjoy all the rights resulting from the privilege, lien, and mortgage aforesaid, and may, on the petition of the Attorney General, filed in either of the District Courts of the First and Second Judicial districts of this State, or other competent tribunals, cause all the property, immovables, slaves, rights, machinery, lots, railways, and generally all the property belonging to said Company, to be seized and sold, as required by the laws of the State in cases of mortgages with judgment confessed, for the purpose of enforcing the payment of the principal and interest of the bonds aforesaid; &c.

The parts of the second and third sections omitted in the above extracts, and the whole of the fourth and fifth sections of the act, are irrelevant to the questions involved in this action.

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pany, slaves, machinery, railways, buildings, and more especially upon a car house then being constructed, a saw mill and appurtenances on the bayou Loutre, and a certain number of slaves who are mentioned by name.

The interest on the bonds not having been regularly paid, the Attorney General sued out an order of seizure and sale, according to the condition of the contract. Various creditors of the Company intervened, and opposed this proceeding on the part of the State, alleging superior privileges to that of the State, upon certain property of the Company not enumerated in the acts of mortgage.

First. F. De Lizardi & Co. claim the vendor's privilege for \$6099 upon iron rails, laid down on a portion of the road not included in the mortgage given to the State, as well as the privilege of seizing creditors on the same, it having been seized previously to the issuing of the order of seizure in this case. They also claim as pledgees certain judgments, notes, and claims belonging to the Company, to secure the same debt.

Second. Albert, as agent of Norris, claims the vendor's privilege on a locomotive. He has also seized certain claims.

Third. Millaudon, and the Orleans Insurance Company, claim a judicial mortgage on a lot of ground, and on a slave acquired by the Company since the mortgage to the State.

Fourth. Lallande, and J. and L. Garnier claim as judgment creditors, having seized claims and suits of the Company.

Fifth. Smith, and others, in the employment of the Company, claim privileges as such.

Roselius, Attorney General, for the State. The act of 1838, under which the bonds of the State in favor of the Company were issued, refers in express terms to that of the 13th March, 1837, and makes the provisions of the second, third, fourth and fifth sections of the latter applicable to the transaction between the State and the defendants. The act of 1837 gives the State not merely a mortgage, but "the first lien, privilege, and mortgage on all the property of the Company, within the limits of the State, at the time the Company shall fail to pay either the principal or interest of the bonds." Persons contracting with the Company were

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bound to know that the State had the first lien and mortgage on all its property.

S. L. Johnson and *L. Janin*, contra. By the second section of the act of 1838, the Company is required to execute its obligation for the loan made by the State, and to secure its payment by a mortgage. An act, on the part of the Company, was necessary to secure the payment; and this act was required to be executed in the same manner as the acts prescribed by the second section of the act of 13th March, 1837. It was not to be accepted, until the property should have been appraised by three persons appointed by the Governor. The property to be thus appraised, must have been in existence, and this excludes the idea that the future property of the Company was to be affected. This is made still clearer by that part of the section which directs that the loan shall be made only in case the appraisers, the Governor, and the Treasurer shall all be satisfied, that the property so appraised is sufficient to protect the State against loss.

But it has been contended by the Attorney General that the second, third, fourth, and fifth sections of the act of 13th March, 1837, apply to the Mexican Gulf Railway Company, and warrant the construction he has put upon the rights of the State, and the obligations of the Company. The fourth and fifth sections of that act have no bearing upon the present controversy. By the second section it is provided: "That so soon as the President of said Company shall have executed a notarial act, &c., in favor of the Governor of this State and his successors in office, giving a first lien, privilege, and mortgage to the State, upon all property of the Company, immoveables, slaves, rights, machines, lots, railways, and generally upon all property which may appertain to said Company within the limits of the State of Louisiana, which first privilege, lien, and mortgage are hereby declared legal and obligatory, all laws to the contrary notwithstanding, &c., it shall be the duty of the Treasurer to issue the bonds," &c. It thus appears that the *notarial act gives the lien, privilege, or mortgage*, and that it extends only to the property specially affected by the act, which says nothing of future property.

The third section of the act of 1837, provides, that in the event of the failure of the Company to pay either the principal or in-

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terest of the bonds, the whole shall be considered as due, and that the State "shall enjoy all the rights *resulting from the privilege, lien, and mortgage aforesaid*, and may cause all the property, immoveables, slaves, rights, machinery, lots, railways, and generally all the property belonging to said Company, to be seized and sold, as required by the laws of the State *in cases of mortgage with judgment confessed*;"—that is, that the State shall enjoy all the rights resulting from the *act aforesaid*, which gave no rights upon future, or any other property than that specially described therein. The rights of the State are those of a mortgagee under an act importing a confession of judgment, and apply only to the property specially mortgaged. An order of seizure and sale is to be taken out, without citing the defendant; and the evidence of debt, as well as the property bound, must, therefore, appear from the notarial act. The judge can order the seizure of no other property than that specified in the act. In the absence of clear and precise provisions, the court will not presume that the legislature intended to alter the general laws of the State, and dispense with a description, in the act, of the property mortgaged, (Civil Code, arts. 3273, 3274,) or to authorize the mortgaging of future property. Civil Code, art. 3276.

BULLARD, J. Among the admissions of the parties in the record, is the following: "The land on which the Rail Road has been made does not belong to the Company, none of the owners having been expropriated." It is not, therefore, independently of the act of the legislature, susceptible of being mortgaged, and is not affected by judicial or legal mortgages. That act, we doubt not, rendered it susceptible of being mortgaged, and subjected it to a special conventional privilege, so far as the State is concerned, and for the purpose of securing the reimbursement of the loan; but the Railway is not an immoveable, either by nature or destination, if the soil over which it is laid belongs to another. The rails, therefore, did not become immoveable by being laid down.

It is also clear that future property can never be the subject of conventional mortgage. Civ. Code, art. 3276. To this it is replied by the Attorney General, that the mortgage results from the special law passed in this case. We do not so understand it. The act does not create the mortgage, nor could it without the

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consent of the corporation. That consent is expressed in the acts of mortgage. The statute contains only the proposition to loan upon the execution of a lien, privilege, and mortgage upon all the property of the Company. As soon as that proposition is accepted the mortgage exists, and is essentially conventional. That the legislature did not intend to take a general mortgage upon all the property of the Company, present and future, real or moveable, appears also from the clause in the act which requires the appointment of appraisers of its property, who were to satisfy the Governor and the State Treasurer that the property and the bond of the Company are sufficient to secure the State. It was evidently not contemplated that the mortgage should embrace property to be acquired afterwards, because it could neither be appraised nor described, much less that it should defeat the vendor's privilege on property afterwards acquired on credit, or judicial mortgages on lands or slaves which did not belong to the Company at the date of the act of mortgage.

The application of these principles to the cases of the different creditors who have made opposition, is not difficult.

The slave Peter acquired from Phelps, and the lot of ground in the *faubourg* Franklin, are not mortgaged to the State, and are subject to the judgment of Millaudon, Albert, and the Orleans Insurance Company.

De Lizardi & Co. claim the privilege of vendors on the iron rails laid down on the road, except for the first six miles; and their right had been recognized, and they had actually seized under execution, when the State interfered by injunction, alleging a superior right under the statute, and the acts of mortgage and privilege. The rails not having been attached to an immoveable, were still, in our opinion, subject to the vendor's lien, and the injunction obtained by the State ought not to be sustained.

The same principles apply to the other privileged creditors; and we are of opinion, that the opposing creditors have a right to be paid in preference to the State.

It is, therefore, ordered, that the judgment of the District Court be reversed; that the opposing creditors be first paid out of the the property subject to their privileges; and that, to this extent, the injunctions of the opposing creditors be perpetuated.

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In the cases of *Claude Tournier v. Chauchon and another*, *William Prehn v. Etienne Rivolet and another*, and *Alphonse Regnier v. R. H. Hawthorn and another*, from the City Court of New Orleans ; of *William F. Thompson, Syndic, v. Elizabeth Morris and Husband*, *Joseph Albert v. Artemon Hill and another*, *Thomas C. Magoffin v. Oliver Dubois and another*, *Laurent Millaudon v. Artemon Hill and another*, *William Frost and another v. Jacques Léon and others*, *Michael Maher v. Patrick Summers*, *John D. James v. How Hinds*, *Benjamin Florance v. Joseph A. Beard*, and *Benjamin Florance v. John Mitchell*, from the Commercial Court of New Orleans ; of *Neally and another, v. Wellington and another*, *Paul Liautaud v. Jean Jonau*, and *Thomas H. Gorman v. Seth W. Nye*, from the District Court of the First District, the judgments of the lower courts were affirmed on appeal, in New Orleans, with damages, during the period embraced by this volume.

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I. *From what Judgments an Appeal will lie.*

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- 2. Where the act which imposes a fine prescribes that it shall be recovered by a civil action, the officers of the State cannot, by instituting a suit in the form of an indictment, deprive the party of the right of appeal to the Supreme Court. *State v. Linton*, 55.
- 3. An appeal will lie from an order maintaining an injunction until the succeeding term of the court. It is an interlocutory judgment which may effect irreparable injury. *Newell v. Morton*, 103.
- 4. Where the matter really in dispute is under three hundred dollars, and a larger amount is claimed in the petition, evidently for the purpose of giving jurisdiction to the appellate court, the appeal will be dismissed.
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- 6. An appeal will lie from a judgment on a demand in reconvention, where the sum claimed in reconvention is sufficient to give jurisdiction to the appellate court, though the original demand be under three hundred dollars; but the judgment on the latter cannot be examined into. The demand in reconvention is in the nature of a new action. *Gore v. Kendig*, 387.
- 7. No appeal will lie from an order, discharging a rule to show cause why an injunction should not be dissolved, on the ground that the petition sets forth

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II. *Period within which Appeal will lie.*

8. Where an appeal is taken, after the lapse of twelve months from the day on which final judgment was rendered, by one who alleges in his petition of appeal that he is a non-resident, and the allegation is denied, the case will be remanded to try the issue; and until the judgment rendered thereon, and the evidence on which it is based, is sent up, no opinion will be pronounced on any other point in the case. *Griffing v. Bowmar*, 112.
9. The general doctrines relative to the interruption of prescription, do not apply to the period fixed by art. 593 of the Code of Practice, after which no appeal will lie. No appeal can be taken after the expiration of that time, though one may have been dismissed, which was taken within the period. *Ib.* 113.

III. *Abandonment of Right to Appeal.*

10. Where, after obtaining an order allowing him an appeal, plaintiff does not appear to have attempted to avail himself of it by giving bond and security, nor to have taken any steps, until after the expiration of a year from the date of the judgment, to procure a transcript of the record, nor to have made any application to the judge *a quo* for a new appeal, the right of appeal will be lost.
Sibley v. Roman Catholic Congregation of Natchitoches, 27.
11. When the period has elapsed within which a party might have appealed, he will not be allowed to contest his rights in the name of another appellant.
Griffing v. Bowmar, 113.
12. In an action to recover the undivided half of a tract of land, for the rents and profits from the commencement of defendant's illegal possession, and for a division of the tract, there was a judgment for the plaintiff for the portion of the land claimed, and in favor of defendant for a certain sum for his improvements over and above the amount due by him for rents and profits. The decree ordered a partition of the land. In conformity with the part of the judgment ordering a partition, plaintiff proceeded to have the tract divided, and the respective portions designated by a further decree homologating the proceedings of the notary and experts in making the partition, and ordering himself to be put in possession of the half allotted to him, on paying the amount previously adjudged to be due for the improvements. *Held*, that this was not such an acquiescence, on the part of the plaintiff, in the judgment, by voluntarily executing it, as is contemplated by art. 567 of the Code of Practice, and will not prevent his appealing from so much thereof as condemns him to pay for the improvements above the rents and profits. *Mulliken v. Rowley*, 253.

IV. *Appeal Bond.*

13. The signature of the appellant is not necessary to the appeal bond. His

obligation to discharge any judgment rendered against him on the appeal, results from the judgment itself. *Fisk v. Friend*, 264.

V. Effect of Appeal.

14. Where, through error, an order has been made allowing a suspensive appeal on security for costs only, and no transcript of the record has been delivered to the party, the order may be rescinded by the lower court on a rule to show cause. *Mathison v. Field*, 42.
15. Where the amount fixed by the judge for the appeal bond, is less than that required by law to render the appeal suspensive, it will be good as a devolutive one; the bond, in the latter case, being only to secure the payment of the costs. *Tipton v. Crow*, 63.

VI. Parties to Appeal.

16. In an action on a joint contract, the suit was dismissed by the inferior court as to one of the defendants, on the ground of his domicile being in a different parish. Plaintiff took no appeal from the judgment of dismissal, but obtained a judgment against the other defendant. On an appeal by the latter: *Held*, that the action being on a joint contract, both contractors must be before the court; that the plaintiff having failed to make use of the means given him by law to reverse the erroneous decision of the inferior court, cannot avail himself of his own neglect; and that there must be judgment as in case of nonsuit. *Thompson v. Chrétien*, 26.
17. The testator had bequeathed all his estate to his mother and one of his sisters. An order for a sale of the property having been procured by the executor, a sister of the deceased, to whom no part of the estate had been left, obtained an injunction to prevent the sale, and the curator of the testator's mother, an interdicted person, intervened in the suit, alleging that the latter was a forced heir recognized by the will, that the injunction was for her benefit as well as the plaintiff's, claiming part of the damages sued for, and praying to be allowed, with the consent of the plaintiff, to unite with the latter, and to pay a part of the costs. Answer by defendant to the petition of intervention, denying the right of the curator to intervene; and judgment dissolving the injunction, and ordering the executor to proceed with the sale. On an appeal by plaintiff and intervenor: *Held*, that the plaintiff, having no interest in the succession of the testator, had no right to interfere with its administration: and that no judgment having been rendered for or against the intervenor in the lower court, his appeal must be dismissed. *Field v. Mathison*, 38.
18. Where an appeal is taken from a judgment in an action on a joint contract, all who were required to be parties below, must be made parties to the appeal, and this, though a part only have appealed, or the appeal will be dismissed. *Drew v. Atchison*, 140.
19. All the parties who are interested that the judgment should remain undisturbed, must be made parties to the appeal, or it will be dismissed.

Garcia, &c. v. Their Creditors, 436.

20. A creditor of an insolvent, in whose favor a judgment has been rendered, on a tableau of distribution, securing him a privilege or mortgage, must be made a party to any appeal, taken by another creditor or the syndic, for the purpose of reversing such judgment. *Ib.*

VII. Citation of Appeal.

21. Where an appellee resides in the State, service of citation of appeal must be on the party himself, and not on his counsel. *Lee v. Kemper*, 1.
 22. Under the act of 20th March, 1839, time will be allowed to correct any error or omission in the service of citation of appeal, where such error or omission did not result from the fault or neglect of the appellant. *Ib.*
 23. Failure to serve citation of appeal in due time, will authorize the appellee to delay his answer until the expiration of the period allowed him by law, or, perhaps, to require a new citation, but not to demand the dismissal of the appeal. *Grove v. Harvey*, 271.

VIII. Record of Appeal.

24. Under the act of 20th March, 1839, time will be allowed to correct any errors or omissions in the record of appeal, where such errors or omissions did not result from the fault or neglect of the appellant.
Lee v. Kemper, 1.
 25. Where it does not appear from the record, that the amount in controversy exceeds three hundred dollars, the appeal must be dismissed. The appellant must show that he is entitled to an appeal. *Hall v. Sanders*, 10.
 26. Third persons, not parties to the suit, who allege themselves aggrieved by the judgment, to whom the right of appeal is given by art. 571 of the Code of Practice, are entitled to avail themselves of every thing in the record affecting their rights. *Griffing v. Bowmar*, 113.
 27. Where the record shows that the defendant moved to have a judgment by default set aside, he will not be permitted to urge before the appellate court, that no such judgment was obtained. *Hemken v. Farmer*, 155.
 28. It is not required that the grounds upon which a judgment by default was taken, should be stated in the record. The absence of any exception, or answer, is, itself, evident and sufficient ground. *Ib.*
 29. Where the record contains the evidence on which a judgment by default was made final, it is unnecessary that it should state that it was taken down at the request of either party. *Ib.*
 30. A certificate by the clerk, that the record "contains all the evidence upon which the judgment appealed from was rendered," is insufficient.
Grand Gulf Rail Road and Banking Co. v. Douglass, 169.
 31. Where the appellee has answered to the merits, and the record is so defective that the case cannot be examined, and justice requires that it should be tried *de novo*, the judgment of the lower court will be reversed, and the case remanded. *Ib.*
 32. Where the evidence has not been taken in writing, it is the duty of the appellant to require the adverse party to join him in drawing up a statement

of the facts, or, in case of disagreement or refusal by the other party, to apply to the court to make such a statement, in order that the clerk may prepare a complete record of the case. *Id.*

33. A bill of exceptions is only necessary, where something is to be brought to the knowledge of the appellate court, which would not otherwise appear in the record. *Harrison v. Weymouth*, 340.

See 36, *infra*.

IX. *Answer and Exceptions waived below, or which may be pleaded for the first time on Appeal.*

34. A prayer for the amendment of a judgment must be made when the answer to the appeal is filed. It will be too late, when the case is fixed for trial. *McGuire v. Bry*, 196.
35. An exception to the jurisdiction of the court, waived below, cannot be revived in the appellate court. *Reynolds v. Rowley*, 201.
36. There is a class of exceptions which may be pleaded for the first time on the appeal; but the facts necessary to sustain them, must appear from a mere inspection of the record. *Zollicoffer v. Briggs*, 236.

X. *Verdict and Judgment appealed from.*

37. The verdict of a jury will not be disturbed, unless clearly wrong.
McCoy v. Hunter, 118. *Hughes v. Lee*, 429.
38. A case will not be remanded, after appeal, on an affidavit of newly discovered evidence. The court cannot notice any thing which may have occurred subsequent to the date of the judgment appealed from.
Succession of Hamblin, 130.
39. On a question of fact, the judgment of the lower court will be affirmed, unless manifestly erroneous. *Bordelon v. Kilpatrick*, 159.
40. Action for the balance of an account, with interest, and verdict and judgment in favor of plaintiffs for a certain sum, without interest, and no new trial applied for by the latter. On an appeal by defendant, and prayer by plaintiffs for the amendment of the judgment, so as to allow the interest claimed: *Held*, that no attempt having been made to correct the judgment in the court below, by moving for a new trial, no amendment can be allowed in the appellate court. *Lambeth v. Burney*, 254.
41. The admission of irrelevant testimony is no ground for remanding a case for a new trial, where its exclusion would not probably vary the result.
Ferguson v. Whipple, 344.
42. Objections to a verdict lose much of their weight, when not made before the court which tried the case originally. A case will be less readily remanded on a question of fact, where a new trial has not been moved for below. An appeal from the judgment of an inferior tribunal, founded on a verdict, should only be taken after the refusal of a new trial.

Hughes v. Lee, 429.

43. The decisions of inferior tribunals in matters addressed to their discretion, will not be interfered with, unless in cases of extreme hardship or manifest injustice. *Gottheil v. Fisk*, 434.
44. Where the petition prays for a judgment against defendants *in solido*, and one of the latter severs in his answer, but does not plead that the obligation is joint only, and judgment is rendered against defendants *in solido*, it will not be disturbed on appeal. *Colestock v. Paie*, 440.

Vide 31, *supra*.

XI. Damages on Appeal.

45. The court has no authority to give damages for a frivolous appeal, when not prayed for. *Garrett v. Grimball*, 8.

ARGUMENT OF CASE.

A party against whom an order of seizure and sale had been issued, presented a petition alleging that the mortgage and notes were obtained by fraud, and that the mortgage was illegally executed, and praying for an injunction, for a judgment rescinding the act, for damages against the mortgagee and a third person alleged to have been concerned in the fraud, and for a trial by jury. The mortgagee answered, praying that the injunction might be dissolved, the demand rejected, and for a judgment in his favor for the amount of his debt. *Held*, that the causes of opposition not being confined to those enumerated in art. 739 of the Code of Practice, and the proceedings having been changed from the *via executiva* to the *via ordinaria*, the mortgagee must be considered as a defendant in the proceedings to obtain the injunction; and that the other party, like other plaintiffs, was entitled to open and close the argument. *Beaulieu v. Furst*, 345.

ASSIGNEE.

See BANKRUPTCY, 2.

ATTACHMENT.

1. The formalities prescribed by art. 254 of the Code of Practice, which requires where the defendant has no known place of residence, or conceals his person, or is absent, or resides out of the State, that the sheriff shall serve the attachment and citation, by affixing copies thereof to the door of the parish church of the place, or to that of the room where the court in which the suit is pending is held, stand in the place of citation, and form the basis on which all subsequent proceedings must rest, and their omission will be fatal. Service of citation on the defendant, is the first step to be taken. *Putnam v. Grand Gulf Rail Road and Banking Co.*, 232.
2. The remedy by attachment is a harsh one, and those who resort to it, must comply strictly with the requisites of the law. *Ib.*

3. The subsequent return of a party, whose property had been attached on an affidavit that he had left the State with the intention of never returning, will not alone be sufficient ground for dissolving the writ, where circumstances render it probable that his original intention was not to return. The intention of returning should have been clearly proved, to entitle the defendant to a dissolution of the attachment. *Reeves v. Comly*, 363.
4. The surety in an attachment, though a resident of a different parish, may, under the third section of the act of 20th March, 1839, be proceeded against, summarily, before the court by which the original suit was decided. The object of that section was to authorize the court before which the action was instituted, to determine all questions, principal and incidental, raised in the course of the proceedings, and thus to secure a speedy adjustment of the rights of the plaintiff. *Wallace v. Glover*, 411.
5. Where plaintiff, in an action commenced by attachment, has obtained a judgment before defendant's application to be declared a bankrupt under the act of Congress of 1841, he will be entitled to a preference on the property attached. *Aliter*, where defendant's application was made before judgment. In the last case no privilege is acquired. *Fisher v. Vose*, 457.

ATTORNEY AT LAW.

1. An attorney is not admissible as a witness to disclose facts, the knowledge of which he acquired confidentially, in the practice of his profession. But when in possession of papers belonging to his client's adversary, or when called on, after having had them in his possession, to disclose what he has done with them, or to point out where they may be found, the rule does not apply; and he may be as properly called on to produce the papers necessary to establish the rights of the adverse party, if still in his possession, or interrogated as to facts which may lead to their discovery, as his client himself could be. C. P. 140, 473. *Travis v. January*, 227.
2. An agreement, by an attorney at law, to receive payment of a judgment in any thing but the legal currency of the United States, will not be binding on the plaintiff. *Dunbar v. Morris*, 278.
3. On a rule upon an attorney, under the third section of the act of 27th March, 1823, to show cause why an information should not be filed against him, it is the duty of the judge by whom the rule was granted, to decide as to the sufficiency of the cause shown. The act does not require that the Attorney General should be notified of, or take any part in this preliminary proceeding. *State v. Judge of First District*, 416.

ATTORNEY, DISTRICT.

The twenty-first sect. of the act of 22d February, 1817, which allows the prosecuting attorneys on behalf of the State, ten per cent on amounts collected by them, to be paid by the defendant, will not authorize the allowance of such a commission to a District Attorney, who appears on behalf of the officers of the State, for the purpose of dissolving an injunction, obtained by

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a delinquent sheriff to stay an execution issued against him by the Treasurer. The defence of such a suit, is one of the duties that devolves on the District Attorney as a public officer. *Scarborough v. Stevens*, 147.

ATTORNEY IN FACT.

See AGENCY. EVIDENCE, 32.

BAIL.

1. Where the condition of a recognizance is, that the principal shall appear at court to answer such matters and things as may be objected against him on behalf of the State, and shall not depart the said court without leave thereof, and no formal surrender has been made of him to the sheriff by his sureties, and the accused effects an escape from the court room while the jury are deliberating on his case, the recognizance will be forfeited. His sureties might have released themselves, at any time, by a surrender of their principal; but until manifesting, by an actual surrender, their intention to be no longer bound, the principal remained in their custody, notwithstanding his appearance in court. *State v. Martel*, 22.
2. Whenever a question arises out of a bail bond, it is incidental to the main action, and may be tried summarily, without instituting a new suit.

Wallace v. Glover, 411.

BANK.

1. When the rate of interest to be charged by a Bank on loans or discounts, is limited by its charter, it cannot stipulate for a higher rate on the amount of any loan or discount, in consideration of its forbearance to sue.
Exchange and Banking Company of New Orleans v. Boyce, 307.
2. The act of incorporation of a banking company provided that its capital should be divided into shares of one hundred dollars, of which five dollars should be paid at the time of subscribing for the stock, and the residue in such instalments, and at such times, as might be required by the Directors. Fifty dollars on each share were called in, and paid. A resolution, subsequently adopted by the Directors, provided, "that any stockholder who shall pay in anticipation a part, or the full amount due on the stock held by him, shall be entitled to dividends thereon in proportion to the amount so paid in." Under this resolution, a stockholder paid up the whole amount due on the stock held by him, and received dividends thereon, and loans (less, however, than the amount so advanced by him) upon the pledge of it. The Bank having gone into liquidation, required the re-payment of the loan, and refused to call for further contributions from the other stockholders. An action was commenced by the stockholder who had paid in full against the Bank, to compel the calling in of the whole amount subscribed, or, in default thereof, or in the event of the inability of the stockholders to pay the balance due, to recover the amount paid by him beyond fifty dollars on each share, with interest on the over-payment, and to restrain the company, from ex-

acting re-payment of the loan made to him, until the stockholders should be placed on an equality as to their payments. The Bank, thereupon, sued on the notes given for the loan. On appeal from a judgment rendered in the two actions, which had been consolidated : *Held*, That no stockholder can be liable for more than one hundred dollars on each share held by him, and that each share must lose an equal amount on the final liquidation of the Bank. That if the whole capital be sunk, those who have paid but fifty per cent will be debtors for the balance, and those who have paid in full cannot be called on for more. That if but half have been lost, the former are no further liable, but a balance will be due to the stockholder who has paid in full. That the payment of the whole amount of the shares under the resolution of the Directors, did not change the relative position of the stockholders to each other as partners, except as to the dividends, the one having merely anticipated the payment of all he could ever be called upon to pay, and the others remaining liable for the balance of their subscriptions. That the payment was under the tacit condition that, if the concern proved profitable, the party so paying should receive dividends in proportion to the amount paid by him, and on the winding up of its business, after payment of the debts from the surplus profits, the whole amount so paid in; and, if not profitable, that he should lose only the same proportion, upon each share, as the other stockholders. That *quoad* the creditors of the Bank, the excess above fifty per cent so paid is capital, liable for its debts; but that, as among the stockholders, the party who made the advance is a creditor to the extent of the surplus, and entitled to interest thereon from the time when the Bank ceased its operations. That the stockholders are liable for the whole amount of their subscriptions, and that, if any further payment beyond fifty dollars on each share be necessary to the discharge of the debts of the company, it will be the duty of the Directors to call on all the stockholders for an equal contribution; and that it would be unjust to use the amount paid by one stockholder, beyond the others, for that purpose. That the Bank having gone into liquidation, a stockholder may maintain an action against it; and that the loan, being less than the amount advanced by the borrower beyond the other stockholders, may be retained by him, unless required for his proportionate contribution towards the payment of the debts of the company.

Millaudon v. The New Orleans and Carrollton Rail Road Co., 488.

BANKRUPTCY.

1. The object of the act of Congress of the 19th August, 1841, establishing a uniform system of bankruptcy, was, while it released the debtor, to distribute the proceeds of his property as equitably as possible among his creditors, due regard being had to the nature of the different contracts and liens affecting it. *Fisher v. Vose*, 457.
2. Where a party to a suit pending before a State court, applies to be declared a bankrupt under the act of Congress of 19th August, 1841, the proceedings must be suspended, for a reasonable time, to enable him to file the decree, when the assignee must be made a party. As soon as the decree in bankruptcy is pronounced, the bankrupt, in relation to all actions for and against

him except such as the statute prescribes, is legally dead, and can only be represented by the assignee. *Ib.*

3. Where plaintiff, in an action commenced by attachment, has obtained a judgment before defendant's application to be declared a bankrupt under the act of Congress of 1841, he will be entitled to a preference on the property attached. *Aliter*, where defendant's application was made before judgment. In the last case, no privilege is acquired. *Ib.*

BILLS OF EXCHANGE AND PROMISSORY NOTES.

- I. *Accommodation Endorsers.*
- II. *Transfer.*
- III. *Presentment for Payment.*
- IV. *Indulgence, or Release of a Party.*
- V. *Protest for Non-Payment.*
- VI. *Evidence in Action on.*
- VII. *Payment.*

I. *Accommodation Endorsers.*

1. An accommodation endorser, must be viewed in the light of a surety, and as such is entitled to discuss the property of his principal.

Dwight v. Linton, 57.

II. *Transfer.*

2. The payee of a note made by the defendant, desiring to secure a debt due to plaintiffs, endorsed the note in blank, and deposited it in the hands of plaintiffs' attorney, to apply a portion of the proceeds, when due, to the payment of the debt; the balance to be accounted for to the endorser. Defendant was notified of the transfer to plaintiffs' attorney for the purposes mentioned, and promised to pay the note to the attorney. In an action against the maker: *Held*, that the endorsement and delivery of the note for the purposes stated, and the notice to defendant, operated a legal transfer of the portion intended to be paid to the plaintiffs; that defendant's promise established his consent to the division of the debt; that claims against the payee, subsequently acquired by defendant, can only be set off against the portion of the note not transferred for plaintiffs' benefit; and that the attorney became the agent of both the plaintiffs and payee, and was accountable to each for the portions respectively due to them. *Lambeth v. Kerr*, 144.
3. One who purchases a note, knowing that the payment will be contested, will hold it subject to any defence to which it would have been subject in the hands of the payee. *Bordelon v. Kilpatrick*, 159.
4. The transfer of a negotiable note, by endorsement, operates a transfer of any mortgage given to secure its payment. *C. C.* 2615.

Auguste v. Renard, 389.

III. *Presentment for Payment.*

5. A note dated the 29th of August, payable at six months, will be due on the 3d of March following. *Wood v. Mullen*, 395.
6. Proof of demand of payment, at the place at which the note is payable, on or after its maturity, is essential to a recovery in an action on the note *Ib.*

IV. *Indulgence, or Release of a Party.*

7. Discharging, or giving time to any of the parties to a note or bill, is a discharge of every other party who, upon paying it, would be entitled to sue the party to whom such discharge or indulgence has been granted.
Calliham v. Tinner, 299.
8. The holder of a protested note, having presented it for payment to the administrator of the succession of the payee and first endorser, it was allowed by the latter, and placed on the tableau of distribution filed by him. Subsequently to the homologation of the tableau, the holder obtained a judgment, by confession, against the second endorser, and, in consideration of a higher rate of interest, granted him time, at the expiration of which the latter paid the amount due on the note. In an action by the second endorser against the administrator of the first, to recover the amount thus paid: *Held*, that the first endorser, who would have been entitled, on payment of the note to the holder, to require its delivery, that he might exercise his rights against the maker, was discharged by the indulgence; and that the insolvency of the maker, at the time of the indulgence, cannot affect the question of his discharge. *Ib.*

V. *Protest for Non-Payment.*

9. Notice of protest must be directed to the post office nearest the residence of the person to whom it is sent. Even where a party has been in the habit of receiving his letters at different offices, and is proved to have had a box in the most distant of the two, notice of protest directed to the latter will be bad. *Mechanics and Traders Bank of New Orleans v. Compton*, 4. *Nicholson v. Marders*, 242.
10. The act of thirteenth of March, 1827, relative to the protest and notices to drawers and endorsers of bills and notes, does not change the general commercial law, as to the diligence to be used in serving notices of protest; it merely provides a new mode of proof of such diligence, by authorizing the notary, or other officer, to state in his protest the manner in which the demand was made of the drawer, acceptor, or person by whom such order or bill was drawn or given, and, in a certificate subjoined thereto, the manner in which the notices were served or forwarded, and by making a certified copy of such protest and certificate evidence of all the matters therein stated. The provisions of this act being in derogation of the general commercial law, the mode of proof which it authorizes will be received as sufficient evidence of notice, only where the formalities it prescribes have been strictly complied with. *Duncan v. Sparrow*, 164.
11. Where the party to whom notice is to be given, does not reside in the town

where the protest was made, the second section of the act of 1827, requires, *first*, that the notice be put into the post office nearest to the place where the protest was made, and *secondly*, that it be addressed to the party to be notified, at his domicile or usual place of residence; and the omission of either will be fatal. *Ib.*

12. A notice of protest addressed to a party, at the post office from which he receives his letters and the one nearest to his residence, or addressed to him, without indicating any particular place, and deposited in such post-office, will not be a sufficient compliance with section two of the act of 1827. The notice must, in addition, be addressed to him at his domicile or usual place of residence. *Ib.*

13. Notice of protest to an endorser, put into the post office at the place where the note was payable and at which he was in the habit of receiving his letters, addressed to him there, is insufficient by the law of Mississippi. Otherwise, in this State, since the act of thirteenth of March, 1827.

Ib. Application for Re-hearing, 167.

14. Proof that notice of protest was deposited in the post office at seven o'clock, A. M. the day after the protest, shows due diligence; and it will be presumed, in the absence of evidence to the contrary, that the notice was in time to go by the mail of that day. *Commercial Bank of Natchez v. King, 243.*

15. The certificate of a notary that "he left the notice of protest at the domicile of the endorser," is sufficient. It is not necessary that it should show whether he delivered the notice to one in the house, or simply left it there, as a notice either way is good. *Manadue v. Kitchen, 261.*

16. Notice to one who resides in a place where the protest was made, must be served personally, or by leaving it at his residence or place of business. *Ib.*

17. Where a party resides at two places, alternately, being generally at one during one portion of the year, and at the other during the rest, but goes frequently from one to the other, notice of protest, directed to either, will be sufficient.

Exchange and Banking Company of New Orleans v. Boyce, 307.

VI. Evidence in Action on.

18. Art. 2256 of the Civil Code, which provides that parol evidence shall not be received against or beyond what is contained in written acts, is inapplicable to a case where the defendant offers witnesses to prove that the endorsement of a note was merely as security, and that it was to be paid out of collections to be made by him from claims due to the drawer. The evidence neither explains, nor contradicts the written instrument, but goes to establish a collateral fact or agreement in relation to it.

Dwight v. Linton, 57.

19. In an action in this State against the endorser of a note, dated at a place in this State in the parish in which the endorser resides, payable in another State, the presumption will be, until the contrary is shown, that the note was endorsed at the place of its execution; and the obligation will be governed by the *lex loci contractus*.

Duncan v. Sparrow—Application for Re-hearing, 167.

20. Where it clearly appears that defendant intended to authorize a third person to endorse certain notes in his name, he will be bound by such endorsement, though the letter of attorney were received by his agent after the endorsement. The authority, subsequently received, would amount, at least, to a ratification of the act of the agent.

Exchange and Banking Company of New Orleans v. Boyce, 307.

21. The holders of notes given for the price of a tract of land, though not identified with the sale by the *paraph* of a notary, will be entitled to a privilege on the thing sold. The *paraph* of the notary is not the only means by which the notes may be identified. Their identity may be proved by his oath. *Succession of Johnson*, 216.
22. A credit which appears to have been endorsed on a note while in the possession of the payees, will be binding on them, unless they show it to have been made through error. *Norcross v. Theurer*, 375.

See 6. 10. 14. *supra*.

VII. Payment.

23. The holder of an accepted draft for a sum payable in the notes of a particular Bank, protested at maturity, will be entitled to recover the value of the notes at the date of the protest. A subsequent tender of the amount in the notes of the Bank, they having depreciated in the mean time, will not entitle the defendant to settle the debt at the value of the notes at the date of the tender. *Meeks v. Davis*, 326.
24. A note, though made payable in dimes, may be discharged by a payment in any other legal coin of the United States.
- Commissioners of the Atchafalaya Rail Road and Banking Co. v. Bean*, 414.

CITATION.

1. It is not necessary that a citation should contain the name of the judge of the court from which it is issued. Art. 179 of the Code of Practice enumerates all the requisites of a citation. *Hemken v. Farmer*, 155.
2. The formalities prescribed by art. 254 of the Code of Practice, which requires where the defendant has no known place of residence, or conceals his person, or is absent, or resides out of the State, that the sheriff shall serve the citation by affixing a copy thereof to the door of the parish church of the place, or to that of the room where the court in which the suit is pending is held, stand in the place of citation, and form the basis on which all subsequent proceedings must rest, and their omission will be fatal. Service of citation on the defendant, is the first step to be taken.

Putnam v. Grand Gulf Rail Road and Banking Co., 232.

See APPEAL, VII.

CLERK OF COURT.

It is not enough that a clerk certify the result of the action of a court; he

must make copies of what appears on the records, of which he is the keeper. *Succession of Bowles*, 33.

SEE EVIDENCE, 8.

CODES, ARTICLES OF, CITED, EXPOUNDED, &c.

- I. *Civil Code of 1808.*
- II. *Civil Code.*
- III. *Code of Practice.*

I. *Code of 1808.*

- Book III, Tit. II, art. 48. Donations, *inter vivos* of moveables or slaves. *Harlin v. L'église*, 194.
- , arts. 210. 220. Donations by marriage contract, to husband or wife. *Ib.*
- , Tit. III, arts. 56 to 64. Interpretation of agreements. *Wells v. Compton*, 171.
- , Tit. V, art. 15. Donations *propter nuptias*. *Harlin v. L'église*, 194.
- , Tit. XXI, art. 6. Exemption from seizure of undivided share of heir in a succession. *Noble v. Nettles*, 152.

II. *Civil Code.*

48. Domicil of minor, where. *Calliham v. Tanner*, 299.
128. Powers of married woman, when a public merchant. *Thorne v. Egan*, 329.
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COMPENSATION.

See PLEADING, V.

CONFLICT OF LAWS.

See CONTRACTS, 8.

CONFUSION.

To an action by the Commissioners, appointed under the act of 14th March, 1842, for the liquidation of a Bank, for the amount of a due bill, defendants pleaded in compensation a check in their favor, for an equal amount, drawn on the Bank by a depositor. The check was presented for payment on the 10th of March. A writ of sequestration had been issued against the Bank on the preceding day, but the judgment declaring the forfeiture of its charter was rendered on the 11th of the same month, and not signed until the 15th. *Held*, that the debts were extinguished by confusion on the 10th, when defendants, who were debtors for the amount of the due bill, became creditors for that of the check.

Commissioners of the Atchafalaya Rail Road and Banking Co. v. Bean, 414.

CONSTITUTION OF THE STATE, EXPOUNDED, &c.

Art. 4, sect. 6. Style of Process. *Scarborough v. Stevens*, 147.

CONTINUANCE.

1. In an affidavit for a continuance, on the ground of the absence of a witness,

a statement "that the witness has left the city for a few days," is equivalent to an allegation that he is expected to return at the expiration of that period, and will be sufficient. *Harrison v. Waymouth*, 340.

2. Where, on an application for a continuance, defendant swears, that he expects to prove by a witness, who is absent, "that plaintiffs had caused great damage to him by their illegal conduct, that he is not indebted to them, and that he cannot safely go to trial without his testimony," the circumstance of his having other witnesses to the same facts, ought not to deprive him of the benefit of a continuance; for the absent witness might have the means of speaking more positively than the others. *Id.*

CONTRACTS.

1. Where an undertaker has not complied with the terms of his contract for the erection of a house, but his employer receives and uses it, the latter will be bound to pay for the value of the work. *Clark v. Kemper*, 10.
2. In an action on a joint contract, all the obligors must be made defendants, though one of them may have performed his part, or may be domiciliated in a parish beyond the jurisdiction of the court, parties contracting joint obligations being considered to waive the personal privilege of being sued before the court having jurisdiction over the place of their domicile; and the judgment must be against each defendant, separately, for his proportion.
Thompson v. Chertien, 26.
3. Courts of justice will not lend their aid to either party, to enforce a contract entered into for purposes reprobated by law. *Puckett v. Clarke*, 81.
Eastman v. Beiller, 220.
4. Arts. 2080, 2082 of the Civil Code require that all the obligors in a joint contract shall be sued together, including those who may have performed their part, in order that the latter may recover back what they have paid, in case it should be determined they were not bound. The judgment for costs must be *in solido*, against those who have not performed their part.
Drew v. Atchison, 140.
5. In the interpretation of contracts, the intention of the parties is to be ascertained, and effect given to it, and to all the clauses of the contract. No construction is to be given which will render important expressions useless. The intention must be determined by the words of the contract, if possible; but where the intention is doubtful, the interest of the parties, or other contracts, may be referred to. Where a clause is susceptible of two interpretations, it must be understood in that sense in which it will have some effect. So, the manner in which it has been executed, or acted under, by both parties, or by one with the express or implied assent of the other, also furnishes a rule of interpretation. Finally, in doubtful cases, the construction must be against the party who has contracted the obligation.
Wells v. Compton, 171.
6. Where the intention of the parties to a contract is doubtful, under art. 1951 of the Civil Code, the court will inquire into the whole conduct of the parties in relation thereto. *Id.*

7. In all actions of rescission, the party seeking relief must have offered to restore his adversary to the situation he was in before the contract.

Tippett v. Jett, 313.

8. Where a person in New Orleans orders, by letter, goods to be shipped to him from New York, offering to pay for them at a certain period after shipment, the contract will be governed by the laws of the latter place, where the final assent necessary to the completion of the contract was given, and the order received and executed. *Sh v. Cahey*, 381.

9. The putting a debtor in default, is a condition precedent to the recovery of damages for the violation of a contract. The want of it need not be pleaded, but may be taken advantage of at any time. C. C. 1906.

Hodge v. Moore, 400.

10. A debt, as between the debtor and creditor, is indivisible, without the consent of both. A debtor cannot be compelled to pay his debt to a number of transferees, among whom it may please the creditor to divide it. C. C. 2107, 2149. The provisions of the twelfth chapter, of the seventh title, of the third book of the Civil Code, arts. 2612-2024, must be understood as applying only to entire debts, rights, or claims.

Cantrelle v. Le Goaster, 432.

11. A counter-letter, or something equivalent thereto, is the only proof admissible to establish simulation, not fraudulent, between the parties to a contract, or their representatives. Parol evidence is inadmissible.

Liautaud v. Baptiste, 441.

12. A legatee, representing an ancestor, and claiming under him, can have no other means of avoiding a contract than such as the ancestor possessed.

Id.

COSTS.

See CONTRACTS, 4. MINOR, 14. SUCCESSIONS, 21.

COURTS.

I. *Supreme Court.*

II. *Courts of Probate.*

III. *District and Parish Courts.*

I. *Supreme Court.*

See APPEAL.

II. *Courts of Probate.*

1. Courts of Probate have exclusive jurisdiction of claims for money against successions administered by curators, executors, &c.; and all suits for money, pending before the ordinary tribunals, against one who dies leaving a vacant succession, must be transferred to the Court of Probates of the place where his succession is opened. *Succession of Ludwig*, 92.

2. A Court of Probate is competent to determine a question of title where it arises collaterally, and its examination becomes necessary to enable it to arrive at a correct conclusion on matters within its jurisdiction. As where, in an action against a curator for the amount of certain notes executed by the deceased, title to the notes is set up by a third party. In such a case, the Court of Probates will decide who is the real creditor of the succession
Succession of Goodrich, 100.
3. In all cases concerning minors, the judge referred to is the judge of the parish within whose jurisdiction the minors reside, if residents of the State. Act 18 March, 1809, sec. 8. *Succession of Winn*, 303.
4. The appointment of a tutor or curator to a minor, belongs to the Probate Judge of the domicile or usual place of residence of the father or mother of such minor, if either be alive. C. P. 944. *Ib.*

See 8, *infra*. SUCCESSIONS 20.

III. District and Parish Courts.

5. An overseer, though entitled to a privilege on the crop for the payment of his wages, cannot maintain an action against his employer in the parish in which the plantation is situated, where the domicile of the latter is in a different parish. The privilege granted by law to overseers is, like all others, an accessory to the principal obligation, and must follow it.
Hollander v. Nicholas, 7.
6. Art. 996 of the Code of Practice, which authorizes actions for debts due from a succession to be brought before the ordinary tribunals, where the heirs, though all or some of them be minors, are in possession of the estate, should, perhaps, be confined either to heirs absolute, or to beneficiary heirs in possession of a succession after it has been fully administered. But where a succession appears to have had but few debts, and to have been administered to a certain extent, and to have been in the possession of the widow and heirs of the deceased for several years, an action to recover a debt due by it, may be brought before the courts of ordinary jurisdiction.
Porter v. Muggah, 29.
7. The penalty imposed by the eighteenth section of the act of 7th June, 1806, on the owner or occupier of a plantation, for keeping slaves thereon, without a white or free colored person as manager or overseer, can only be recovered by civil action before an ordinary tribunal. The action must be brought before a Justice of the Peace, a Parish, or District Court, according to the number and amount of the fines claimed. *State v. Linton*, 55.
8. The first section of the act of 25th March, 1831, which provides that whenever the Parish Judge of any parish is disqualified by interest, or otherwise, to try any case in the Parish Court, that the District Court shall have jurisdiction thereof, and that the same shall be transferred by the Parish or Probate Court to the District Court, does not contemplate the transfer of all the mortuary proceedings and documents relative to any estate in which the Judge of Probates may be interested. The District Court may take cognizance of

the appointment of a curator, where the Probate Judge is interested ; but it is not necessary for this purpose, that the papers relative to the succession should be removed from their proper place of deposit.

Ex parte Borden, 399.

9. On a rule upon an attorney, under the third section of the act of 27th March, 1823, to show cause why an information should not be filed against him, it is the duty of the Judge by whom the rule was granted, to decide as to the sufficiency of the cause shown. The act does not require that the Attorney General should be notified of, or take any part in this preliminary proceeding. *State v. Judge of First District, 416.*

See APPEAL, 14. ATTACHMENT, 4. CONTRACTS, 2.
SUCCESSIONS, 20.

CURATOR.

See COURTS, 2. 8. SUCCESSIONS.

DAMAGES.

See APPEAL, XI. CONTRACTS, 9. LEASE, 3.

DEFAULT, JUDGMENT BY.

See APPEAL, 27. 28. 29.

DISCUSSION.

See PLEADING, 9. SURETY, 3. 9.

DIVISIBLE OBLIGATIONS.

See CONTRACTS, 10.

DOMICIL.

1. Where a party has repeatedly and publicly declared himself to be a resident of a particular parish, he will not be allowed, though actually residing elsewhere, to gainsay his own declarations, which may have misled others.
Commercial Bank of Natchez v. King, 943.
2. Where a mother, who had been confirmed as the natural tutrix of her minor children, marries a second husband domiciliated in a different parish, without having convened a family meeting to determine whether she shall be continued as tutrix, both herself and the minors will acquire immediately, by the very fact of the marriage, a domicile in the parish of the second husband. C. C. 48. *Succession of Winn, 303.*

See COURTS, 5. PLEADING, 3. 5.

DONATIONS.

- I. *Donations Inter Vivos.*
- II. *Donations Mortis Causa.*
- III. *Donations generally.*

I. *Donations Inter Vivos.*

1. All donations *inter vivos* must be passed before a notary and two witnesses.
Brittain v. Richardson, 78.
2. The right of children to attack donations *inter vivos* made by their parents which exceed the disposable portion, accrues only after the death of the latter; for they might survive all their forced heirs, in which event all donations would be valid and binding. *Succession of Ludewig*, 99.
3. Donations *propter nuptias* were not excepted from the provision of art. 48, tit. 2, book 3, of the Code of 1808, that "no donation *inter vivos* of moveable property or slaves, shall be valid for any other effects than those of which an estimate, signed by the donor or donee, or by those who accept for him, is annexed to the record of the donation." The omission of the estimate, in a donation of slaves, is not cured by the delivery of the slaves.
Harlin v. Léglise, 194.
4. Donations *propter nuptias* are not excepted from the general rules prescribed by the Code of 1808, in relation to other donations. *Ib.*
5. The rights acquired by children legitimated by the subsequent marriage of their parents, have no effect against gratuitous dispositions previously made by the latter. The legitimation has no retroactive effect. It operates only from the date of the marriage. C. C. 219, 948, 1556.
Liautaud v. Baptiste, 441.

II. *Donations Mortis Causa.*

6. Posterior testaments, which do not expressly revoke prior ones, will annul such dispositions in them, as are incompatible with, contrary to, or entirely different from the provisions of the former. Thus, the appointment of one as sole executor, will annul any appointment of another executor made in a previous will. *Succession of Bowles*, 31.
7. The probate of a will is a judicial proceeding, and must be authenticated according to the act of Congress of 26th May, 1790. *Ib.* 33.
8. The certificate of the clerk of a court in another State, that the transcript "is a true copy from the original filed in my office, as proven in open court, at the October term, 1841, and ordered by the court to be recorded," is not such evidence of the testament having been duly proved, before a competent judge of the place where it was received, as will authorize its admission to probate and execution in this State. It does not show how the will was proved, nor what was the order of the court. Duly certified copies of the orders or decree in relation to the proof and recording of the will, should have accompanied the transcript of the latter. *Ib.*

9. An instrument, the real object of which was a disposition *mortis causa*, if executed without the formalities required by law to give it validity as such, can have no effect. *Brittain v. Richardson*, 78.

III. Donations generally.

10. Where donations *inter vivos* or *mortis causa*, are clothed with the formalities required by law to give them validity, the forced heirs alone can sue for their reduction, in case they exceed the disposable portion; but when void for the want of such formalities, the legitimate heirs or other representatives of the estate, as well as the forced heirs, may sue to annul them.

Brittain v. Richardson, 78.

11. The father of certain natural children, who had made a sale of all his property to a third person, by a subsequent marriage legitimated his children. After the death of the father, the property was sold to a fourth. In an action by the children against the latter, to recover the property on the ground that the sales were simulated, plaintiffs alleged that it was agreed between the deceased and his vendee, that, notwithstanding the sale, the former should remain the owner of the property, which should be reconveyed to him when required, or to his children in case of his death, and that the sale was in the nature a *fidei commissum*, and, as such, prohibited by law. *Held*, that the interest of the plaintiffs, who were subsequently legitimated, not having existed at the date of the first sale, parol evidence was inadmissible to prove that it was a *fidei commissum*; that the object of the action is to enforce the *fidei commissum* complained of; and that plaintiffs cannot, under the pretext that it was a *fidei commissum*, be allowed to establish the simulation of the sale, and thereby give effect to the very agreement prohibited by law. *Liautaud v. Baptiste*, 441.

12. The object of the law-maker being to prevent those whom it disables from receiving donations, from secretly enjoying them, all *fidei commissa*, even those in favor of persons capable of receiving, are prohibited. C. C. 1507.
Ib.

DOTAL PROPERTY.

See HUSBAND AND WIFE.

EMANCIPATION OF SLAVES.

Where a slave ordered to be emancipated by will, sues to establish her right to freedom, she must allege and prove that she is thirty years of age, or a native of the State, and that she has behaved well during the four preceding years. Act 9 March, 1807. C. C. art. 185. The act of 31st January, 1807, effected no other change in the law than to authorize, under certain circumstances, emancipation before the thirtieth year.

Nolé v. De St. Romes, 484.

ERROR.

See APPEAL, 14. 24. EVIDENCE, 11.

EVIDENCE.

- I. *When to be Introduced.*
- II. *Matters Judicially Noticed.*
- III. *Interest of Witness.*
- IV. *Examination of Witnesses, and Reduction of Testimony to Writing.*
- V. *Commission to take Testimony.*
- VI. *Judicial Records and Proceedings, and Copies thereof.*
- VII. *Non-Judicial Records and other Public Instruments, and Copies thereof.*
- VIII. *Private Writings.*
- IX. *Admissibility of Parol Evidence under arts. 2256 and 2895 of the Civil Code.*
- X. *Secondary Evidence.*
- XI. *Irrelevant Evidence.*
- XII. *Onus Probandi.*
- XIII. *Presumption.*
- XIV. *Evidence of Particular Persons.*
 1. *Parties.*
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- XV. *Evidence in Particular Actions.*
 1. *On Bills of Exchange and Promissory Notes.*
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 3. *For Partition.*
 4. *In Petitory Actions.*
 5. *In Actions of Rescission.*
 6. *In Proceedings by Attachment.*
 2. *In Suits for Freedom.*

I. *When to be Introduced.*

1. Parties are always allowed to exercise their own judgment, as to the order of introducing their proofs. *Lynch v. Benton*, 106.
2. An amended petition propounding interrogatories to a party to the action, offered after the trial has commenced, will be too late.
Dobbs v. Hemken, 123.
3. A case will not be remanded, after appeal, on an affidavit of newly discovered evidence. The court cannot notice any thing which may have occurred subsequent to the date of the judgment appealed from.
Succession of Hamblin, 130.
4. On a rule against one who had been appointed, by consent of parties, to receive and sue for all debts due to the partnership of which plaintiff and de-

defendant were members, to show cause why he should not pay the amount so received by him into court, he may introduce evidence to show that he had paid debts due by the partnership, without first showing any authority to do so from the parties, or from either of them. A party cannot be controlled as to the order of introducing the testimony in support of his case. The authority to pay might be afterwards proved. *Kellar v. Williams*, 327.

II. Matters Judicially Noticed.

5. No evidence will be required of the official capacity of functionaries commissioned by the State. *Follain v. Lefevre*, 13.

III. Interest of Witness.

6. It is no objection to a witness that he is interested in a case, when offered to testify against his interest. *Travis v. January*, 227.
7. One who had signed a sequestration bond as surety for plaintiffs, but had been released before the trial, another surety having been substituted, is a competent witness for the plaintiffs. *Comstock v. Paie*, 440.

IV. Examination of Witnesses, and Reduction of Testimony to Writing.

8. Evidence, when required to be reduced to writing, must be taken down by the clerk, and should, in all cases, be read to the witness before he leaves the stand. The judge has no right, under any circumstances, to add to, or take from it, without recalling the witness. *Jonau v. Ferrand*, 364.
9. A broker, examined as a witness to prove the market value of certain stocks, will not be compelled to disclose the names of persons to whom he has sold shares of the same stock, where there is no intimation of any intention to examine such purchasers for the purpose of contradicting him, their names being, under such circumstances, immaterial. *Id.*

V. Commission to take Testimony.

10. Art. 439 of the Code of Practice, making it the duty of the court which grants a commission to take testimony, to fix a day for its return, was intended to obviate any dispute as to the sufficiency of the time allowed for its execution, when the case should be called for trial before its return. But the neglect of the court to fix a return day, will not render the commission null. *Follain v. Lefevre*, 13.
11. A commission to take testimony, directed to "any one of the associate judges of the City Court of New Orleans," appeared from the record to have been executed by one N. Jackson. There being no associate judge of that name, on an objection to its admission, and allegation by the party that it was a clerical error for O. P. Jackson, an actual judge of that court: *Held*, that the record not having been corrected by *certiorari*, the error is fatal. *Id.*

12. Where a commission to take testimony has been duly executed, and returned into court, either party may use the evidence taken under it; and this right is not waived, by omitting to cross-examine the witnesses.

Dwight v. Linton, 57.

13. Where the certificate of the magistrate, to whom a commission was addressed, attests that the witness appeared and answered the interrogatories, and signed his name thereto "after having been examined upon the Holy Evangelist of Almighty God," it will be sufficient. The language of such a certificate is immaterial, provided it appear clearly that the requisites of the law have been complied with. *Follet v. Jones*, 274.
14. The object of the 7th sect. of the act of 25th March, 1828, which requires that interrogatories to be propounded to witnesses examined under commission, shall be served on the opposite party or his counsel, three days previous to being forwarded, is to afford the latter sufficient time to examine them, and prepare his objections or cross-interrogatories; and where such interrogatories have been handed to a party, with a request that he will accept service thereof and return them the next day, and he acknowledges service, and returns them accordingly, with his cross-interrogatories, he will be considered as having waived any further delay. *Ib.*
15. As a general rule, the deposition of a witness cannot be read, if his personal attendance can be procured. *Hawkins v. Brown*, 310.
16. The deposition of a witness, to whom cross-interrogatories were propounded by the opposite party, having been taken *de bene esse*, and returned into court, the latter objected to its admissibility, on the ground that the witness, who was within the jurisdiction of the court, should have been produced in person. *Held*, that the depositions were inadmissible; and that it could not be inferred from the fact that no objection was made to the depositions previous to the trial, that the opposite party intended to dispense with the personal attendance of the witness. *Ib.*

VI. Judicial Records and Proceedings, and Copies thereof.

17. The probate of a will is a judicial proceeding, and must be authenticated according to the act of Congress of 26th May, 1790.
- Succession of Bowles*, 33.
18. The certificate of the clerk of a court in another State, that the transcript "is a true copy from the original filed in my office, as proven in open court, at the October term, 1841, and ordered by the court to be recorded," is not such evidence of the testament having been duly proved, before a competent judge of the place where it was received, as will authorize its admission to probate and execution in this State. It does not show how the will was proved, nor what was the order of the court. Duly certified copies of the orders or decree in relation to the proof and recording of the will, should have accompanied the transcript of the latter. *Ib.*
19. It is not enough that a clerk certify the result of the action of a court; he must make copies of what appears on the records, of which he is the keeper. *Ib.*

20. An instrument, signed by a parish judge alone, purporting to be the *procès-verbal* of the sale of real estate belonging to a succession, which recites that the sale was made in pursuance of a decree of the Court of Probates in which the succession was opened, and of the advice of a family meeting, is insufficient to establish the existence of the decree.

Beard v. Morancy, 119.

21. Letters of executorship, under the hand and seal of the Judge of the Court of Probates, are conclusive evidence of the facts they purport to establish; nor can the jurisdiction of the judge be inquired into collaterally.

Succession of Hamblin, 130.

22. Where the meaning of an instrument is uncertain, the record of another suit, by a different plaintiff, but to which the defendant was a party, will be admissible in evidence to show, by the acts and declarations of the latter, what his understanding of the instrument was. The present plaintiffs, not having been parties to the suit, cannot avail themselves of the statements in the pleadings as judicial admissions, absolutely conclusive of the rights of the defendant. They must be considered simply as other declarations.

Wells v. Compton, 171.

23. Surveyors' plats, made under the order of court, in a suit to which defendant, against whom they are offered, was a party, though the plaintiff was not, are admissible in evidence as circumstances, so far as they show acts of the defendant. *Ib.*

24. The statements of witnesses taken down in a suit, by a different plaintiff, but to which the defendant was a party, cannot, as a general rule, be received in evidence against the latter. *Aliter*, where the testimony of a witness so taken down is offered to discredit the evidence subsequently given by him; or where the declarations of a deceased surveyor are offered to explain his operations. *Ib.*

25. The record of another suit, when offered to support a plea of *res judicata*, is admissible to show what the parties claimed, and what was decided in such suit. So the record of another suit, to which the plaintiffs were parties, though joined with others and in a different capacity, is admissible against them, when offered by the defendants, who were plaintiffs in that case; the latter are entitled to the full benefit of any decision made on the rights of the parties, and to show that the plaintiffs have compromised any of their rights by that suit. *Ib.*

VII. *Non-Judicial Records and other Public Instruments, and Copies thereof.*

26. The Registers of the Land Offices of the United States, may, like all other keepers of public records, give copies or extracts from any books or documents in their custody, and such copies, when duly certified, are admissible in evidence; but they cannot attest or certify the contents of such books or documents in any other manner. *Judice v. Chrétien*, 15.
27. The provisions of arts. 697 and 698 of the Code of Practice, requiring the sheriff to cause the act of sale executed by him for property sold under a

- fi. fa.*, to be recorded in the office of the clerk of the court from which the writ was issued, were designed to give to the sheriff's deed the authenticity of a notarial act, and to authorize its introduction in evidence without further proof of its execution. They do not repeal, nor in any way modify the act of the 24th March, 1810, which declares, sect. 7, that no notarial act concerning immoveable property shall have effect against third persons, until recorded in the office of the parish judge of the parish in which it is situated; nor that of 26th March, 1813, providing, sect. 1, that sales of land or slaves, under execution, shall, except between the parties, be void, unless so recorded. *Lee v. Darramon*, 160.
28. The act of the thirteenth of March, 1827, relative to the protest and notices to drawers and endorsers of bills and notes, does not change the general commercial law, as to the diligence to be used in serving notices of protest; it merely provides a new mode of proof of such diligence, by authorizing the notary or other officer to state in his protest, the manner in which the demand was made of the drawer, acceptor, or person by whom such order or bill was drawn or given, and, in a certificate subjoined thereto, the manner in which the notices were served or forwarded, and by making a certified copy of such protest and certificate evidence of all the matters therein stated. The provisions of this act being in derogation of the general commercial law, the mode of proof which it authorizes will be received as sufficient evidence of notice, only where the formalities it prescribes have been strictly complied with. *Duncan v. Sparrow*, 164.
29. Parish Surveyors are regularly appointed officers known to the law, and when dead, their declarations, taken in other suits, may be used, when necessary, as evidence to explain their acts. So plats made by a Parish Surveyor under orders of court, in a suit to which defendant was a party, are admissible, after the decease of the former, to prove the declarations of the defendant made at the time of the survey. *Wells v. Compton*, 171.
30. The official acts and certificates of Parish Surveyors are entitled to full faith and credit, in all of the courts of this State. *Ib.*
31. The *procès-verbal* of a survey made by a Parish Surveyor, is legal evidence of the acts which it recites, as that notice was given, that the parties attended, &c. *Ib.*
32. A power of attorney admitted to record in another State, is not "a record or judicial proceeding of any court," within the meaning of the act of Congress of twenty-sixth May, 1790. A copy of such an instrument, must be certified in the manner required by the act of twenty-seventh of March, 1804. *Reynolds v. Rowley*, 201.
33. In controversies between the original grantees of a tract of land, or those claiming directly under him, and one in whose favor, as assignee, the title has been confirmed by the Commissioners of the United States, the certificate in favor of the latter, and the facts recited in it, will not be evidence, but the confirmation will enure to the benefit of the party having the inchoate title. Otherwise, as to third persons showing no title. The Commissioners appointed to decide upon land titles emanating from the former sove-
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reigns of Louisiana, being authorized, by different acts of Congress, to confirm inchoate titles existing at the time of the change of government, in favor of certain grantees, or *their legal representatives*, had authority, *incidentally*, to decide whether one who claimed, not as the original grantee, was entitled to a confirmation; and such confirmation, in favor of an assignee, has been uniformly regarded as entitling the latter to a patent. It is evidence against the government, and though not binding on the original grantee, or those claiming under him, is *prima facie* evidence against the rest of the world. *Thomas v. Turnley*, 206.

34. A document, certified by the Secretary of State of another State, under his hand and the great seal of the State, to be a correct copy of an act of the legislature, on file in his office as having been approved on a particular day, is sufficiently attested.

Commercial Bank of Vicksburg v. King, 243.

35. A receipt of the Receiver of Public Moneys, for the price of government lands, is sufficient evidence of title from the United States to form the basis of a petitory action—not that it is of equal dignity with a patent, but evidence of an equitable title on which the owner may recover.

Lott v. Prudhomme, 293.

36. The certificate of a notary, that no note signed or endorsed by a particular person, was protested by him within a certain period, is inadmissible. A notary can only certify copies of proceedings in his office; any other fact, within his knowledge, must be disclosed under oath.

Exchange and Banking Company of New Orleans v. Boyce, 307.

37. Under the act of Congress of 26th May, 1790, an act of the legislature of another State can only be authenticated by affixing the seal of the State thereto. *Union Bank of Maryland v. Freeman*, 48.

38. A copy of an act of the legislature of another State, certified to have been made "from *Liber*, I. G., one of the law records of the State, belonging to the office of the Court of Appeals," is inadmissible. A copy from the original deposited among the archives of the State, would be better evidence.

Id.

VIII. *Private Writings.*

39. Proof of the signatures of the grantor, and of that of one of the subscribing witnesses residing in another State, is sufficient evidence of the execution of a deed *sous seign privé*. *Thomas v. Turnley*, 206.

IX. *Admissibility of Parol Evidence under arts. 2256 and 2895 of the Civil Code.*

40. Art. 2256 of the Civil Code, which provides, that parol evidence shall not be received against or beyond what is contained in written acts, is inapplicable to a case where the defendant offers witnesses to prove that the endorsement of a note was merely as security, and that it was to be paid out of collections to be made by him from claims due to the drawer. The

evidence neither explains, nor contradicts the written instrument, but goes to establish a collateral fact or agreement in relation to it.

Dwight v. Tinton, 57.

41. Parol evidence is admissible to show that the vendor made known, at the time of the sale, the defects of the thing sold. *Hawkins v. Brown*, 310.
42. Parol evidence is admissible to prove an agreement to sell a vessel, anterior to the date of the written act of sale. *Bell v. Firemen's Insurance Company of New Orleans*, 423. *Bell v. Western Marine and Fire Insurance Co.*, 428.
43. A claim for conventional interest must be established by written proof. C. C. 2895. *Lambeth v. Burney*, 251.

X. Secondary Evidence.

44. Plaintiff offered in evidence copies of deeds taken from the records of the office of the Parish Judge, on making oath that he had inquired in vain, from all persons who were likely to have any knowledge of the matter, for the originals, which he believed had been lost or destroyed. It was shown that the deeds were more than thirty years old; that the Record of Conveyances had been regularly kept; that it was formerly the practice to give back the originals after they were recorded; and that the Parish Judge and subscribing witnesses were dead. Other circumstances tended to show that the deeds were genuine. Held, that the copies were properly admitted.

Thomas v. Turnley, 206.

XI. Irrelevant Evidence.

45. The admission of irrelevant testimony is no ground for remanding a case for a new trial, where its exclusion would not probably vary the result.

Ferguson v. Whipple, 344.

46. Instead of striking out any portion of the pleadings, a more regular course is to permit the parties to go to trial, and to reject, on the objection of the opposite party, any evidence offered to sustain such portion.

Jonau v. Ferrand, 364.

XII. Onus Probandi.

47. Where a sheriff has received a tax roll and undertaken its collection, he must show that he has used due diligence. He cannot throw upon the State, the burden of proving that he actually received the amount.

Scarborough v. Stevens, 147.

48. A party, who seeks to render another liable for the debt of a third person, must prove such liability beyond all doubt, or he cannot recover. C. C. 3008. *Hazard v. Lambeth*, 378.

XIII. Presumption.

49. In an action, in this State, against the endorser of a note dated at a place in this State in the parish in which the endorser resides, payable in another

State, the presumption will be, until the contrary is shown, that the note was endorsed at the place of its execution; and the obligation will be governed by the *lex loci contractus*.

Duncan v. Sparrow—Application for Re-hearing, 167.

50. The acknowledgment and payment by tutors, curators, and executors, of debts due from the estates administered by them, are *prima facie* evidence of their correctness. When, from the extravagance of the charges, the unnecessary character of the supplies, or from any other circumstance, bad faith or dishonesty may be presumed, courts cannot be too strict; but where there is every appearance of good faith and correct management, such fiduciaries should not be held, in the settlement of their accounts, to the strictest rules of evidence. Were they obliged to prove the signatures to every receipt, the cost of the attendance of witnesses or of their depositions, would involve the estates in heavy and unnecessary expense.

Succession of Frantum, 283.

51. Proof that the notice of protest was deposited in the post office at seven o'clock, A. M. the day after the protest, shows due diligence; and it will be presumed, in the absence of evidence to the contrary, that the notice was in time to go by the mail of that day.

Commercial Bank of Natchez v. King, 243.

52. Where the record does not show whether a slave sold was delivered to the vendee at the time of the adjudication, or after the execution of the notarial act, it will be presumed that the vendor retained possession until the act of sale was passed. C. C. 2588. *Hivert v. Lacaze, 357.*

See 56, *infra*.

XIV. Evidence of Particular Persons.

1. Parties.

53. Any consent given, or admission made on record, by a party, in the progress of a suit, from which his adversary may derive any legal right, cannot be withdrawn without the consent of the latter, who is entitled to the benefit of its full legal effect. *Aliter*, where such consent or admission confers no right, as where experts have been appointed, by consent, to ascertain a fact, in which case either party may move to rescind the order, or it may be done by the court *ex officio*. *Kohn v. Marsh, 48.*
54. In an action against a seizing creditor and the sheriff, in which plaintiff prayed for an injunction and damages, he cannot call upon the latter to testify as a witness. He must release him, or propound interrogatories to him as a party. *Dabbs v. Hemken, 123.*
55. A party to a suit, interrogated as to a particular fact, cannot, under the pretext of answering the interrogatory, annex to his answer letters of a third person, and thus introduce in evidence statements not under oath, for the purpose of influencing the jury on other points in the case.

Reynolds v. Rowley, 201.

56. In contests between the creditors of an insolvent, the confessions or ac-

knowledge of the latter are not evidence. Such declarations are presumed to be fraudulent. *Blackstone v. His Creditors*, 219.

57. A party to a suit is not bound to answer interrogatories propounded to him by his opponent, unless ordered to do so by the court. C. P. 348.

Commercial Bank of Natchez v. King, 243.

58. Where a party has repeatedly and publicly declared himself to be a resident of a particular parish, he will not be allowed, though actually residing elsewhere, to gainsay his own declarations, which may have misled others.

Ib.

59. Where an action commenced by an administrator, is carried on, after the expiration of his administration, by the heirs, the defendant cannot examine him as a party, by annexing interrogatories to an amended answer. The term of his administration having expired, he has no interest in the case, and cannot be interrogated as a party. *Hawkins v. Brown*, 310.

2. Attorneys at Law.

60. An attorney cannot object, on the ground of professional confidence, to being interrogated as to the manner in which he became possessed of papers introduced by him in support of his client's cause, where it does not appear that he received them from his client or his agent.

Reynolds v. Rowley, 201.

61. An attorney is not admissible as a witness to disclose facts, the knowledge of which he acquired confidentially, in the practice of his profession. But when in possession of papers belonging to his client's adversary, or when called on, after having had them in his possession, to disclose what he has done within them, or to point out where they may be found, the rule does not apply; and he may be as properly called on to produce the papers necessary to establish the rights of the adverse party, if still in his possession, or interrogated as to facts which may lead to their discovery, as his client himself could be. C. P. 140, 473. *Travis v. January*, 227.

3. Agents.

62. The declarations of one who had acted as an agent, made after the termination of his agency, are not binding on the principal, though the former be dead at the time of the trial. *Reynolds v. Rowley*, 201.

XV. Evidence in Particular Actions.

1. On Bills of Exchange and Promissory Notes.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, VI.

2. For Malicious Prosecution.

63. To maintain an action for a malicious prosecution, the plaintiff must prove: *first*, the prosecution; *second*, that the defendant was the prosecutor, or the cause of the prosecution; *third*, that he was actuated by malice; *fourth*, that there was no probable cause for the prosecution.

Grant v. Deuel, 17.

64. In an action for a malicious prosecution, malice may be established : *first*, by proving express malice ; *second*, by showing want of probable cause for the prosecution. Malice is usually inferred from the want of probable cause. *Ib.*
65. It is a well settled rule of law, founded on principles of policy and convenience, that the prosecutor shall be protected, though his private motives may have been malicious, provided he had probable cause for the charge. Where express malice has been proved, there must be some positive evidence to show that the prosecution was groundless, though slight evidence will be sufficient. *Ib.*
66. An acquittal, or even subsequent proof of complete innocence, is not sufficient evidence of want of probable cause. *Ib.*
67. Proof that the jury entertained doubts on the evidence, or deliberated as to the guilt of the accused after the case was concluded, is proof of probable cause for the prosecution. *Ib.*

3. For Partition.

68. Petition by the syndics of an insolvent for a division of partnership property by sale. Four experts having been appointed, by consent, to report whether the property could be divided in kind, without loss or inconvenience, and two only having reported, on motion of plaintiffs the order appointing experts was rescinded, and the court proceeded to receive other evidence of the facts intended to be established by their report. *Held*, that the report of the experts was not the only mode of proof to which the court might resort, to enable it to decide whether the property should be sold ; and that, under art. 1261 of the Civil Code, any other legal evidence might be received. *Kohn v. Marsh*, 48.

4. In Petitory Actions.

69. A petitory action may be maintained against a naked possessor, upon a title which, if accompanied by possession, would be regarded as a just title. *Thomas v. Turnley*, 206.
70. A petitory action may be defeated, by showing that the title is in a third person, or that the latter has a better title than the plaintiff. *Ib.*
71. To recover against a mere trespasser, who sets up no title in himself or in any other person, it is unnecessary that the plaintiff should show a title, perfect in all respects ; one apparently good will suffice. *Baillio v. Burney*, 317.

5. Actions of Rescission.

72. In all actions of rescission, the party seeking relief must have offered to restore his adversary to the situation he was in before the contract. *Tippett v. Jett*, 313.
73. Proof of an offer by the vendor to annul the sale of a slave, on the payment of a certain sum, will exonerate the plaintiff, in a redhibitory action,

from the necessity of proving a tender of the slave. The tender would have been useless, without the payment of the sum demanded.

Hivert v. Lacaze, 367.

74. The purchaser of a slave, to entitle himself to the benefit of the third section of the act of 2d Jan. 1834, which provides that one who institutes a redhibitory action on the ground that the slave is a runaway or thief, shall not be bound to prove that such vice existed before the sale, when discovered within two months thereafter, where such slave had not been more than eight months in the State, must show that the slave has not resided therein for eight months preceding the sale. *Smith v. McDowell*, 430.

75. A counter-letter, or something equivalent thereto, is the only proof admissible to establish simulation, not fraudulent, between the parties to a contract, or their representatives. Parol evidence is inadmissible.

Liautaud v. Baptiste, 441.

76. The father of certain natural children, who had made a sale of all his property to a third person, by a subsequent marriage legitimated his children. After the death of the father, the property was sold to a fourth. In an action by the children against the latter, to recover the property on the ground that the sales were simulated, plaintiffs alleged that it was agreed between the deceased and his vendee that, notwithstanding the sale, the former should remain the owner of the property, which should be reconveyed to him when required, or to his children in case of his death, and that the sale was in the nature of a *fidei commissum*, and, as such, prohibited by law. Held, that the interest of the plaintiffs, who were subsequently legitimated, not having existed at the date of the first sale, parol evidence was inadmissible to prove that it was a *fidei commissum*; that the object of the action is to enforce the *fidei commissum* complained of; and that plaintiffs cannot, under the pretext that it was a *fidei commissum*, be allowed to establish the simulation of the sale, and thereby give effect to the very agreement prohibited by law. *Ib.*

6. In Proceedings by Attachment.

77. The subsequent return of a party, whose property had been attached on an affidavit that he had left the State for the purpose of never returning, will not alone be sufficient ground for dissolving the writ, where circumstances render it probable that his original intention was not to return. The intention of returning should have been clearly proved, to entitle the defendant to a dissolution of the attachment. *Reeves v. Comly*, 363.

7. In Suits for Freedom.

78. Where a slave ordered to be emancipated by will, sues to establish her right to freedom, she must prove that she is thirty years of age, or a native of the State, and that she has behaved well during the four preceding years. Act 9 March, 1807. C. C. art. 185. The act of 31st January, 1827, effected

no other change in the law than to authorize, under certain circumstances, emancipation before the thirtieth year. *Nolé v. De St. Rome*, 484.

See APPEAL, 29. 30. 32. CONTINUANCE.

EXCEPTION.

See PLEADING, IV.

EXCEPTIONS, BILL OF.

A bill of exceptions is only necessary, where something is to be brought to the knowledge of the appellate court, which would not otherwise appear in the record. *Harrison v. Waymouth*, 340.

EXECUTOR.

See EVIDENCE, 21. SUCCESSIONS.

EXECUTORY PROCESS.

1. The provisions of the Code of Practice, art. 746, *et seq.*, authorizing summary process to enforce judgments rendered in other States or in foreign countries, instead of the ordinary action on the record, which was formerly the only mode of proceeding, must be strictly pursued; and the party resorting to it must show, that he comes clearly within the law, not in appearance only, but in reality. *Miller v. Gaskins*, 94.
2. Defendant having procured an order of seizure and sale, on a judgment rendered in another State, against the plaintiff, a resident of Louisiana, under process of arrest, the latter enjoined the proceeding; alleging that, though it appears from the record an answer was put in for him by an attorney, that no one was authorized to appear for him, and that he never appeared or defended the action. On a motion to dissolve, on the ground that the facts alleged, though true, are insufficient to maintain the injunction; *Held*, that admitting the allegations of the petition to be true, the judgment can have no greater effect than one rendered, after personal service, but without appearance, on a judgment by default; and that the motion should have been overruled. *Id.*
3. Defendant having obtained a judgment against plaintiff in another State, levied an execution on property of the latter in that State, the sale of which was deferred for twelve months, in consequence of not bringing two-thirds of its appraised value. Defendant, thereupon, procured an order of seizure and sale in this State, which plaintiff enjoined. On the trial, the injunction was maintained until the succeeding term, reserving to the parties the right to show whether the judgment had been satisfied out of the property originally seized, or the remedy exhausted. On an appeal by defendant: *Held*, that it is oppressive to carry on two executions at the same time, and that the judgment should be affirmed. *Newell v. Morton*, 103.

4. Where the the sheriff's deed for immoveable property sold under a *fi. fa.*, subject to a previous mortgage, has not been recorded in the office of the parish judge of the parish in which the property is situated, it will be without effect as to the hypothecary creditor, who may seize and sell the same as if in possession of the original debtor. *Lee v. Dar amon*, 160.
5. Defendants having obtained a judgment against plaintiff in a Circuit Court in another State, procured an order of seizure and sale in this. Subsequently to the order of seizure, plaintiff obtained an injunction from the Chancellor of the State in which the original judgment was rendered, staying its execution until the further order of court. On an application to enjoin the order of seizure and sale: *Held*, that the injunction should be maintained until the termination of the chancery proceedings on the original judgment. *Bien v. Loftus*, 163.

See MORTGAGE.

EXPERTS.

See PARTNERSHIP, 3. PLEADING, 26.

FAMILY MEETING.

See MINOR, 3. 4. 9. 13.

FATHER AND CHILD.

1. Illegitimate children, though duly acknowledged, have no claim against the estate of their natural father, but for alimony. C. C. 224, 257, 913.
Liautaud v. Baptiste, 441.
2. The rights acquired by children legitimated by the subsequent marriage of their parents, have no effect against gratuitous dispositions, previously made by the latter. The legitimation has no retroactive effect. It operates only from the date of the marriage. C. C. 219, 948, 1556. *Id.*

FIDEI-COMMISSUM.

See DONATIONS, 11. 12.

FIERI FACIAS.

- I. *Form of Writ.*
- II. *Execution may be taken out by who.*
- III. *Several Executions at the same time.*
- IV. *Of the Seizure.*
- V. *Privilege acquired by Seizure.*
- VI. *Sale of Things Seized.*
- VII. *Execution will be stayed, when.*

I. *Form of Writ.*

1. No particular form is prescribed by law for a warrant or execution, on behalf of the State, against a delinquent tax collector. A writ signed by the Treasurer, commanding the proper officer, "in the name of the State of Louisiana," is a sufficient compliance with the provision of sect. 6, art. 4, of the State constitution, in regard to the style of process.

Scarborough v. Stevens, 147.

II. *Execution may be taken out by who.*

2. One who has paid the debt due to a plaintiff, and been expressly subrogated to his rights, may take out execution against the defendant.

King v. Dwight, 2.

III. *Several Executions at the same time.*

3. A second *fi. fa.* cannot be issued on a judgment, until the first is returned.

State v. Judge of Probates of St. Tammany, 355.

See EXECUTORY PROCESS, 3.

IV. *Of the Seizure.*

4. Where sufficient property could not be found, or has not been seized to satisfy an execution, a further seizure may be made when the deficiency is discovered, or other property found. Where more property has been seized than sufficient, the remedy is pointed out by arts. 652 and 653 of the Code of Practice. Such an over seizure will not authorize an injunction.

Dabbs v. Hemken, 123.

5. Under a judgment against a husband and wife, *in solido*, the sheriff may levy on the separate property of either. *Smallwood v. Pratt*, 152.
6. Under art. 647 of the Code of Practice, the undivided share of an heir in a succession, may be seized and sold under execution.

Noble v. Nettles, 152.

7. It is not necessary that it should be shown that any attempt has been made to seize moveables, immoveables, or slaves, before seizing the rights and credits of the debtor. The property must be pointed out by the latter, or, under art. 649 of the Code of Practice, by allowing the sheriff to execute the writ, without exercising his right of pointing out the property to be seized, he will lose it. *Ib.*
8. Plaintiffs having obtained a judgment against the defendants, seized, under a *fi. fa.*, all the rights, credits, money, and other property of defendants, in the hands, or under the control of the Receiver of Public Moneys at New Orleans. A draft from the Commissioner of the General Land Office on the Receiver, in favor of one of the defendants, was presented for payment after the seizure, which was not accepted, there not being, at the time, sufficient funds in the hands of the Receiver. The draft was subsequently given up by the holder, and the instructions to pay it revoked. On a rule on the Receiver, to show cause why he should not pay over the money in his hands

belonging to defendant. *Held*, that the Receiver had no funds belonging to the defendant; that the money belonged to the United States, and until paid over remained under the control of the government: that the mere order to pay, did not, of itself, transfer to the defendant any money in the hands of the Receiver, but was, at most, only an acknowledgment of the debt.

Mechanics and Traders Bank of New Orleans v. Hodge, 373.

9. A rule cannot be taken on an officer of the United States, in his official capacity, to show cause why he should not pay over money, seized in his hands under a *fi. fa.*, as the property of a third person. To condemn him to pay as an officer, would be to condemn the government, which cannot be done. *Ib.*

V. Privilege acquired by Seizure.

10. Under art. 722 of the Code of Practice, the creditor acquires, by the mere act of seizure, a privilege on the immovable or moveable property seized, which entitles him to a preference over other creditors, unless the debtor has been declared a bankrupt previous thereto. If the seizure created a privilege only where the property of the debtor was sufficient to pay all his debts, it would only attach when it would be useless.

Campbell v. His Creditors, 106.

11. Art. 301 of the Code of Practice, which declares that the "sheriff may be enjoined from paying the claim of the plaintiff out of the proceeds of the sale of the property seized, if a third person oppose such payment, alleging that the defendant has no other property to pay his debts, and pray that the proceeds may be brought into court, to be distributed among all the creditors of the defendant according to the order of their respective privileges or hypothecations," makes a provision in favor of the creditors who have a *higher privilege* than that of the seizing creditor. It directs the proceeds to be divided among the creditors according to their respective privileges and hypothecations, including the privilege obtained by the seizure. *Ib.*

VI. Sale of Things Seized.

12. The circumstance, that the sale of property seized under execution was advertised before the expiration of the three days allowed for notice of the seizure, is immaterial. *Dabbs v. Hemken*, 123.
13. A slight variance between the description of the property in the advertisement, and that in the notice of seizure, which cannot mislead the debtor, is immaterial. *Ib.—Re-hearing*, 129.
14. The second section of the act of 20th March, 1816, requires that the property of a delinquent sheriff, which has been seized under execution issued by the Treasurer of the State, shall be sold for cash, and without appraisement. *Scarlborough v. Stevens*, 147.
15. The purchaser of property sold under a *fi. fa.* on twelve months' credit, having offered defendants' testator to the sheriff as security for the price, received a blank bond from the sheriff to be signed by himself and the testator, and filled up on its return. The bond was signed, but not returned to

the sheriff, till after the death of the surety, which happened a few days after he signed the instrument, when it was filled up. *Held*, that the security having been previously approved by the sheriff, the contract was complete by the signature of the former. *Wells v. Moore*, 156.

16. In a sale under execution, on a twelve months' credit, the sheriff is the agent of the party for whose benefit the sale is made, in taking bond from a purchaser. He is liable to the former if he accept insufficient, and to the latter if he refuse sufficient surety; and is, therefore, the proper judge of its sufficiency. *Ib.*

17. The provision of arts. 697 and 698 of the Code of Practice, requiring the sheriff to cause the act of sale executed by him for property sold under a *fi. fa.*, to be recorded in the office of the clerk of the court from which the writ was issued, were designed to give to the sheriff's deed the authenticity of a notarial act, and to authorize its introduction in evidence without further proof of its execution. They do not repeal, nor in any way modify the act of the 24th March, 1810, which declares, sect. 7, that no notarial act concerning immoveable property shall have effect against third persons, until recorded in the office of the parish judge of the parish in which it is situated; nor that of 26th March, 1813, providing sect. 1, that sales of land or slaves, under execution, shall, except between the parties, be void unless so recorded.

Lee v. Darramon, 160.

18. Where the sheriff's deed for immoveable property sold under a *fi. fa.*, subject to a previous mortgage, has not been recorded in the office of the parish judge of the parish in which the property is situated, it will be without effect as to the hypothecary creditor, who may seize and sell the same as if in possession of the original debtor. *Ib.*

19. A sheriff has a right to retain possession of property sold by him, during the pendency of a rule to show cause why the sale should not be set aside.

Bayon v. Breedlove, 383.

VII. *Execution will be stayed, when.*

20. Where different seizures have been made in the hands of defendant, of whatever sums may be due by him to plaintiff, on a judgment in favor of the latter, execution will be stayed until the seizures are proved to have been satisfied or abandoned. No law authorizes a judgment ordering the amount to be deposited in court, subject to the claims of the seizing creditors.

Rightor v. Slidell, 375.

FRAUD.

See HUSBAND AND WIFE, 2. SALE, VI.

HUSBAND AND WIFE.

1. Under a judgment against a husband and wife, *in solido*, the sheriff may levy on the separate property of either. *Smallwood v. Pratt*, 132.
2. The husband, as the head of the community, has a right to alienate its

property. When done collusively, for the purpose of injuring the wife, she has her remedy against his heirs, after his death, under art. 2373 of the Civil Code, and, perhaps, after a separation from bed and board. *Ib.*

3. Donations *propter nuptias* were not excepted from the provision of art. 48, tit. 2, book 3, of the Code of 1808, that "no donation *inter vivos* of moveable property or slaves, shall be valid for any other effects than those of which an estimate, signed by the donor or donee, or by those who accept for him, is annexed to the record of the donation." The omission of the estimate, in a donation of slaves, is not cured by the delivery of the slaves.

Harlin v. Léglise, 194.

4. Donations *propter nuptias* are not excepted from the general rules prescribed by the Code of 1808, in relation to other donations. *Ib.*
5. A wife has a privilege on the moveables of her husband, for her dotal, but not for her paraphernal property. For the latter, she has only a tacit or legal mortgage, on his immoveables. C. C. 2367, 3182.

Stafford v. Dunwoodie, 276.

6. Defendant having seized under a *fi. fa.* certain moveables belonging to the husband of the plaintiff, the latter procured an injunction, pending which she obtained a judgment against her husband in a suit for separation of property, and, in virtue thereof, caused the moveable property, previously seized by defendant, to be sold, and purchased it herself, crediting the amount upon her judgment. On a motion to dissolve the injunction: *Held*, that by his seizure defendant had acquired a privilege on the moveables seized: that the rights of the wife, being merely paraphernal, gave her no privilege on the moveables; and that having, by the effect of her seizure, disabled the defendant from enforcing his privilege, she was responsible in damages for the injury he sustained from her act. *Ib.*

7. Real property purchased during the existence of the community of *acquêts*, but conveyed to the wife, will be liable for debts contracted by the husband unless proved to have been paid for out of the paraphernal funds of the former. *Marshall v. Mullen*, 328.

8. A married woman, who is a public merchant, may bind herself for any thing relative to her trade, without being empowered by her husband; and in such a case, if there be a community of *acquêts*, the husband will be also bound. C. C. 128. Otherwise, if not a public merchant.

Thorne v. Egan, 329.

9. The authorization of the husband to the commercial contracts of the wife, is presumed by law, whenever he permits her to trade in her own name. C. C. 1779. *Ib.*

10. The wife cannot deprive the husband of the right to administer her dowry. He administers it for his own account, and not as her agent, and is not accountable to her for the profits or revenues derived from it. C. C. 2329, 2330. His obligations are those of an usufructuary. C. C. 2344. Debts contracted by him, during the marriage, as administrator of the dowry, are personal to him, and cannot bind the wife, if she renounce the community. C. C. 2379. *Ib.*

HYPOTHECARY ACTION.

See EXECUTORY PROCESS.

ILLEGITIMATE CHILDREN.

See EVIDENCE, 76. FATHER AND CHILD.

IMMOVEABLES.

A railway is not an immoveable, either by nature or destination, when the soil on which it is laid belongs to another; it is, consequently, not affected by judicial or legal mortgages, nor susceptible of being mortgaged unless authorized by a special act of the legislature.

State v. Mexican Gulf Railway Company, 513.

IMPROVEMENTS.

See ACCESSION.

INDICTMENT.

See APPEAL, 2.

INJUNCTION.

1. The discovery, since the final decision of the appellate court, of new evidence tending to establish allegations in the original petition, is no ground for enjoining the execution of the judgment. The matter is *res judicata*.
Campbell v. Briggs, 110.
2. The trial of an injunction is a summary proceeding, in which neither party is entitled to a jury. *Dabbs v. Hemken*, 123.
3. Where sufficient property could not be found, or has not been seized to satisfy an execution, a further seizure may be made when the deficiency is discovered, or other property found. Where more property has been seized than sufficient, the remedy is pointed out by arts. 652 and 653 of the Code of Practice. Such an over seizure will not authorize an injunction. *Ib*.
4. A proper construction of the third section of the act of the 25th March, 1831, will not authorize the court, on dissolving an injunction, to increase the interest, where the original judgment bears interest at ten per cent a year. Whatever else it may be proper to allow, must be in the form of damages. *Ib*.
5. An execution cannot be enjoined, on grounds which might have been pleaded in defence before judgment. *Benton v. Roberts*, 224.
6. An injunction will not lie to stay the execution of a judgment for the amount of a note given for the price of a tract of land, on the allegation, that since the rendering of the judgment, plaintiff has discovered that the defendant, his vendor, had no title to the land. The execution can only be

resisted by appeal, or action of nullity, or on an allegation of extinguishment by payment, release, confusion, novation, or other legal mode.

Morrison v. Crooks, 273.

7. A party against whom an order of seizure and sale had been issued, presented a petition alleging that the mortgage and notes were obtained by fraud, and that the mortgage was illegally executed, and praying for an injunction, for a judgment rescinding the act, for damages against the mortgagee and a third person alleged to have been concerned in the fraud, and for a trial by jury. The mortgagee answered, praying that the injunction might be dissolved, the demand rejected, and for a judgment in his favor for the amount of his debt. *Held*, that the causes of opposition not being confined to those enumerated in art. 739 of the Code of Practice, and the proceedings having been changed from the *via executiva* to the *via ordinaria*, the mortgagee must be considered as a defendant in the proceedings to obtain the injunction; and that the other party, like other plaintiffs, was entitled to open and close the argument. *Beaulieu v. Furst*, 345.

See APPEAL, 3. EXECUTORY PROCESS, 2. 3. 5.

INSOLVENCY.

1. Under art. 722 of the Code of Practice, the creditor acquires, by the mere act of seizure, a privilege on the immoveable or moveable property seized, which entitles him to a preference over other creditors, unless the debtor has been declared a bankrupt previous thereto. If the seizure created a privilege only where the property of the debtor was sufficient to pay all his debts, it would only attach when it would be useless.
Campbell v. His Creditors, 106.
2. Art. 301 of the Code of Practice, which declares that the "sheriff may be enjoined from paying the claim of the plaintiff out of the proceeds of the sale of the property seized, if a third person oppose such payment, alleging that the defendant has no other property to pay his debts, and pray that the proceeds may be brought into court, to be distributed among all the creditors of the defendant, according to the order of their respective privileges or hypothecations," makes a provision in favor of the creditors who have a *higher privilege* than that of the seizing creditor. It directs the proceeds to be divided among the creditors according to their respective privileges and hypothecations, including the privilege obtained by the seizure. *Id.*
3. In contests between the creditors of an insolvent, the confessions or acknowledgments of the latter are not evidence. Such declarations are presumed to be fraudulent. *Blackstone v. His Creditors*, 219.
4. A debtor who, being unable to pay all his debts at the moment, transacts with his creditors and obtains from them a delay, is not an insolvent. The concession of a respite is based upon the supposed solvency, or eventual ability of the applicant to pay all his debts. The laws relative to respite are not insolvent laws. *Rasch v. His Creditors*, 407.
5. A creditor of an insolvent, in whose favor a judgment has been rendered,

on a tableau of distribution, securing him a privilege or mortgage, must be made a party to any appeal, taken by another creditor, or the syndie, for the purpose of reversing such judgment. *Garcia &c. v. Their Creditors*, 436.

See PARTNERSHIP, 3.

INSURANCE.

1. Where a policy of insurance provides that, "in case the insured have any other insurance against loss by fire on the property, not notified to the insurers, nor mentioned in or endorsed upon the policy, or shall afterwards make any other insurance thereon, and shall not, with all reasonable diligence, give notice thereof, and have the same endorsed on the policy, or acknowledged in writing, the policy shall be void," proof that another policy was obtained on the property, which was not notified to the insured, will discharge the latter from all liability.

Battaille v. Merchants Insurance Company of New Orleans, 384.

2. Where one of the conditions of a policy against fire requires, as part of the preliminary proof, without which no recovery can be had, a declaration under oath, "whether any, and what other insurance has been made on the same property," the insured will forfeit his right to recover by failing to comply with the condition. *Ib.*
3. One who has agreed to sell a vessel, but has neither delivered it nor received the price, has an insurable interest, the vessel being still at his risk. *Bell v. Firemen's Insurance Company of New Orleans*, 423. *Bell v. Western Marine and Fire Insurance Co.*, 428.
4. To entitle a party to recover on a policy of insurance, he must have had an interest in the thing insured at the time of the loss, as well as at the date of the insurance; and the character of this interest cannot be changed, between the date of the insurance and that of the loss, without the assent of both parties. *Ib.*
5. Plaintiffs, owners of a policy of insurance on freight, finding their port of destination in a state of blockade, abandoned the voyage, and returned without insisting upon receiving their freight. There was a provision in the policy that, "the assured shall not abandon in consequence of the port of destination being blockaded, but the vessel shall, in such case, have liberty to proceed to another port not blockaded, and there end the voyage, or wait a reasonable time for the blockade of the original port of destination to be raised." In an action for the amount of the policy: *Held*, that this clause did not authorize the owners to break up the voyage; and implied nothing more than a consent, on the part of the insurers, to take the risk of proceeding to another port, or of waiting a reasonable time for the blockade to be raised. *Marks v. Louisiana State Marine and Fire Insurance Co.*, 454.

INTEREST.

1. A claim for conventional interest must be established by written proof. *C. 2895. Lambeth v. Burney*, 254.

2. In an action, on an open account, against the heirs amongst whom a succession has been partitioned, for articles furnished to their ancestor, interest will be allowed from judicial demand, and not from the death of the ancestor. *Burney v. Brown*, 270.
3. When the rate of interest to be charged by a Bank on loans or discounts is limited by its charter, it cannot stipulate for a higher rate on the amount of any loan or discount, in consideration of its forbearance to sue.
Exchange and Banking Company of New Orleans v. Boyce, 307.
4. An account bears interest from its liquidation ; and will be considered as liquidated from the time when it was rendered, if not objected to within a reasonable period. *Shaw v. Oakey*, 361.
5. Where in a sale of goods a time for payment is fixed, an agreement to pay interest may be implied. *Ib.*
6. An unliquidated account bears interest from judicial demand. *Ib.*
7. A payment cannot be imputed to the reduction of the principal, where any interest is due. *C. C. 2160. Ib.*

See PLEADING. 30.

INTERPRETATION.

1. Where the meaning of an instrument is uncertain, the record of another suit, by a different plaintiff, but to which the defendant was a party, will be admissible in evidence to show, by the acts and declarations of the latter, what his understanding of the instrument was. The present plaintiffs, not having been parties to the suit, cannot avail themselves of the statements in the pleadings as judicial admissions, absolutely conclusive of the rights of the defendant. They must be considered simply as other declarations.
Wells v. Compton, 171.
2. In the interpretation of contracts, the intention of the parties is to be ascertained, and effect given to it, and to all the clauses of the contract. No construction is to be given which will render important expressions useless. The intention must be determined by the words of the contract, if possible ; but where the intention is doubtful, the interest of the parties, or other contracts, may be referred to. Where a clause is susceptible of two interpretations, it must be understood in that sense in which it will have some effect. So, the manner in which it has been executed, or acted under, by both parties or by one, with the express or implied assent of the other, also furnishes a rule of interpretation. Finally, in doubtful cases, the construction must be against the party who has contracted the obligation. *Ib.*
3. Where the intention of the parties to a contract is doubtful, under art. 1951 of the Civil Code, the court will inquire into the whole conduct of the parties in relation thereto. *Ib.*
4. In all surveys, courses and distances must yield to natural and ascertained objects. *Ib.*
5. Where a mortgage recites, that the mortgagor wishes to place the mortgagee "à l'abri de ses avances d'argent, et des effets des endossements que

- celui-ci voudra bien lui fournir,"* it will be considered as having been given to secure past, as well as future advances. *Succession of De Armas*, 343.
6. Acts granting mortgages will, in cases of doubt, be strictly construed. *Ib.*

INTERROGATORIES.

See EVIDENCE.

INTERVENTION.

See APPEAL, 17.

JOINT OBLIGATIONS.

See SURETY.

JOINT OWNERS.

See AGENCY, 2. 3.

JUDGMENT.

1. The provisions of the Code of Practice, art. 746, *et seq.*, authorizing summary process to enforce judgments rendered in other States or in foreign countries, instead of the ordinary action on the record, which was formerly the only mode of proceeding, must be strictly pursued; and the party resorting to it must show, that he comes clearly within the law, not in appearance only, but in reality. *Miller v. Gaskins*, 94.
2. Defendant having procured an order of seizure and sale, on a judgment rendered in another State against the plaintiff, a resident of Louisiana, under process of arrest, the latter enjoined the proceeding, alleging that, though it appears from the record an answer was put in for him by an attorney, that no one was authorized to appear for him, and that he never appeared or defended the action. On a motion to dissolve, on the ground that the facts alleged, though true, are insufficient to maintain the injunction: *Held*, that admitting the allegations of the petition to be true, the judgment can have no greater effect than one rendered, after personal services, but without appearance, on a judgment by default; and that the motion should have been overruled. *Ib.*
3. Letters of executorship, under the hand and seal of the Judge of the Court of Probates, are conclusive evidence of the facts they purport to establish; nor can the jurisdiction of the judge be inquired into collaterally
Succession of Hamblin, 130.
4. Where in an action against sureties who are bound jointly only, they claim in their answer the benefit of division, and it is not alleged that either is insolvent, the judgment must be against each for his virile portion.
McGuire v. Bry, 296.
5. Where the case requires that a judgment should be rendered for the plain-

tiff, directing him to be put in possession of the land sued for, on paying a sum to the defendant for his improvements, the court will order, at the instance of the latter, that he be authorized to take out execution for the amount decreed to him, if not paid within a certain time.

Milliken v. Rowley, 253.

6. By the laws of Mississippi, the forfeiture of a forthcoming bond extinguishes the original judgment; and the forfeited bond itself acquires the force and effect of a new judgment. *Briggs v. Spencer*, 265.
7. In an action on a judgment obtained in Mississippi, defendant having established that the judgment had been extinguished by the execution and forfeiture of a forthcoming bond: *Held*, that there must be judgment as in case of nonsuit. *Ib.*
8. Where by the laws of a State in which a judgment has been obtained, no execution can be issued against the property of the defendant for a certain period, plaintiffs cannot, by suing on the judgment here, proceed against his property in this State, before the expiration of the delay to which defendant had acquired a right. The judgment cannot have a greater effect extra-territorially, than in the State in which it was rendered. *Ib.*
9. The appointment of a tutor by a Court of Probates, can be set aside only by appeal, or by an action of nullity. Its legality cannot be inquired into collaterally. *Succession of Winn*, 303.
10. Where different seizures have been made in the hands of defendant, of whatever sums may be due by him to plaintiff, on a judgment in favor of the latter, execution will be stayed until the seizures are proved to have been satisfied or abandoned. No law authorizes a judgment ordering the amount to be deposited in court, subject to the claims of the seizing creditors.

Rightor v. Stidell, 375.

See RES JUDICATA.

JUDGMENT BY DEFAULT.

See APPEAL, 27. 28. 29.

JUDGMENT INTERLOCUTORY.

See APPEAL, 3.

JURY.

1. The verdict of a jury must always be understood with reference to the pleadings, and as responsive to the issues made by them.
Downes v. Scott, 84.
2. The verdict of a jury will not be disturbed, unless clearly wrong.
McCoy v. Hunter, 119. *Hughes v. Lee*, 499.
3. The trial of an injunction is a summary proceeding, in which neither party is entitled to a jury. *Dabbs v. Hemken*, 123.

4. Jurors are so far the judges of the law as well as of the facts, that they have a right, in all cases, to find a general verdict. But the court, if not satisfied therewith, may grant a new trial. *Thomas v. Turnley*, 206.
5. To entitle a defendant to a trial by jury, under the 24th section of the act of 20th March, 1839, he must show, by his affidavit, that his means of defence are certain and unequivocal, and that they will affect the plaintiff's right to recover. *Smith v. Scott*, 258.
6. A prayer for a trial by jury, by one of two or more debtors bound in *solido*, will not enure to the benefit of those who have not joined therein.
Mulhollan v. Henderson, 297.
7. Objections to a verdict lose much of their weight when not made before the court which tried the case originally. A case will be less readily remanded on a question of fact, where a new trial has not been moved for below. An appeal from the judgment of an inferior tribunal, founded on a verdict, should only be taken after the refusal of a new trial. *Hughes v. Lee*, 429.

JUSTICE OF THE PEACE.

See COURTS, 7.

LEASE.

1. A lessor is bound to keep the premises in a condition fit for the purposes for which they were leased. If he fail to make the repairs necessary during the lease, the tenant may make them himself, and deduct the amount from the rent. *Perrett v. Dupré*, 52.
2. The lessor is bound to indemnify the lessee, for all the damage sustained by the latter in consequence of the vices and defects of the thing leased, though the lessor knew nothing of the existence of such vices and defects at the time of the lease, and even where they have arisen since. *Ib.*
3. Where, after the commencement of a lease, the house becomes so much injured as to be incapable of being rendered fit for the purposes for which it was leased, otherwise than by rebuilding it, and the lessor offers to dissolve the lease, which the lessee refuses, and continues to occupy the building: *Held*, that the lessor will not be responsible for any damage subsequently sustained by the lessee in consequence of the condition of the building, and that the latter will not be entitled to claim any diminution of the rent for the period he continued to occupy the premises after the offer of the lessor to annul the lease. *Ib.*
4. In an action for the rent of a building occupied as a shop by a commercial partnership, the judgment must be against the lessees in *solido*. *Ib.*

LITISPENDÊNCIA, EXCEPTION OF.

See PLEADING, 10. 11.

LOST WRITINGS.

See EVIDENCE, X.

MALICIOUS PROSECUTION.

1. To maintain an action for a malicious prosecution, the plaintiff must prove : *first*, the prosecution ; *second*, that the defendant was the prosecutor, or the cause of the prosecution ; *third*, that he was actuated by malice ; *fourth*, that there was no probable cause for the prosecution. *Grant v. Deuel*, 17.
2. In an action for a malicious prosecution, malice may be established : *first*, by proving express malice : *second*, by showing want of probable cause for the prosecution. Malice is usually inferred from the want of probable cause. *Ib.*
3. It is a well settled rule of law, founded on principles of policy and convenience, that the prosecutor shall be protected, though his private motives may have been malicious, provided he had probable cause for the charge. Where express malice has been proved, there must be some positive evidence to show that the prosecution was groundless, though slight evidence will be sufficient. *Ib.*
4. An acquittal, or even subsequent proof of complete innocence, is not sufficient evidence of want of probable cause. *Ib.*
5. Proof that the jury entertained doubts on the evidence, or deliberated as to the guilt of the accused after the case was concluded, is proof of probable cause for the prosecution. *Ib.*

MEXICAN GULF RAILWAY.

The act of 12th March, 1838, authorizing certain loans to be made to the Mexican Gulf Railway Company, and other Companies, does not, of itself, create a mortgage on the property of those Companies, nor could it without their consent. That consent is expressed by the acts of mortgage, executed in pursuance of it. The act contains only a proposition to loan, upon the execution of a mortgage on the property of the Company ; when accepted, the mortgage exists, and is essentially conventional. The act did not contemplate taking a general mortgage on all the property of the Company, present and future. *State v. Mexican Gulf Railway Co.*, 513.

MINORS.

1. Heirs of age can accept a succession simply, or do acts rendering themselves unconditionally liable. Minors are necessarily beneficiary heirs. *Porter v. Muggah*, 29.
2. The fact that a party was a minor at the time that a judgment was rendered against him, and that his tutor did not attend to, or understand his rights, or take the necessary pains to procure the testimony to establish them, will not entitle him to relief, though it be proved that a different judgment must have been rendered had the proper testimony been produced in the first instance. The first judgment is *res judicata*. *Towles v. Conrad*, 69.

3. The advice of a family meeting is not necessary, to authorize the institution of a suit by a tutor to recover real estate belonging to his ward.

Beard v. Morancy, 119.

4. The decree of the Court of Probates where the succession is opened, made in conformity to the advice of a family meeting, is necessary to authorize the sale of property belonging to minor heirs; and where such a decree has been made, the court will not look beyond it. *Ib.*

5. Property of certain minor heirs having been sold by the parish judge, was afterwards seized under an execution by a creditor of the purchaser. The tutor of the heirs opposed the payment of the proceeds of the sale to the creditor, claiming a vendor's privilege for the price yet due, and setting up a mortgage given to secure the payment. In an action subsequently commenced by him, on behalf of the minors, against the syndic of the purchaser, to recover the land: *Held*, that his opposition to the payment of the proceeds to the seizing creditor, could not preclude the minor heirs from claiming the land itself. *Ib.*

6. The acknowledgment and payment by tutors of debts due from the estates administered by them, are *prima facie* evidence of their correctness. When, from the extravagance of the charges, the unnecessary character of the supplies, or from any other circumstance, bad faith or dishonesty may be presumed, courts cannot be too strict; but where there is every appearance of good faith and correct management, such fiduciaries should not be held, in the settlement of their accounts, to the strictest rules of evidence. Were they obliged to prove the signatures to every receipt, the cost of the attendance of witnesses or of their depositions, would involve the estates in heavy and unnecessary expense. *Succession of Frantum*, 283.

7. The relations of a minor, who, under arts. 290, 293 of the Civil Code, are bound to cause a tutor to be appointed to them, are authorized, and, perhaps, bound to oppose an appointment when illegally made.

Succession of Winn, 303.

8. The appointment of a tutor by a Court of Probates, can be set aside only by appeal, or by an action of nullity. Its legality cannot be inquired into collaterally. *Ib.*

9. Where a mother, who had been confirmed as the natural tutrix of her minor children, marries a second husband domiciliated in a different parish, though without having convened a family meeting to determine whether she shall be continued as tutrix, both herself and the minors will acquire immediately, by the very fact of the marriage, a domicile in the parish of the second husband. C. C. 48. *Ib.*

10. In all cases concerning minors, the judge referred to is the judge of the parish within whose jurisdiction the minors reside, if residents of the State. Act 18 March, 1809, sec. 8. *Ib.*

11. The appointment of a tutor or curator to a minor, belongs to the Probate Judge of the domicile or usual place of residence of the father or mother of such minor, if either be alive. C. P. 944. *Ib.*

12. No legal tutor can be appointed to a minor, unless both the father and mother of the minor be dead. C. C. 281. *Tutorship of Mossy*, 390.
13. Where a mother, the natural tutrix of her minor children, forfeits her tutorship by marrying a second time, without having previously convoked a family meeting to determine whether she shall continue as tutrix, and is re-appointed by the judge, under the advice of a family meeting, she will hold the appointment as a dative tutrix. C. P. 951. *Ib.*
14. Where the proceedings in a contest, relative to the tutorship of a minor, have had no other object than to ascertain which of the parties was legally entitled to the appointment, neither having any personal interest in the matter, the costs will be ordered to be paid out of the estate of the minors. *Ib.*

MORTGAGE.

1. The right of a mortgage creditor is on the thing itself, and may be exercised into whatever hands it may pass. *Succession of Field*, 5.
2. A sale by the administrator of a succession of property held by the deceased, subject to a mortgage, gives the mortgagee no claim against the succession. His rights cannot be affected by such a sale; and he must pursue the property in the hands of the subsequent third possessor. *Ib.*
3. A wife has a privilege on the moveables of her husband, for her dotal, but not for her paraphernal property. For the latter, she has only a tacit or legal mortgage on his immoveables. C. C. 2367, 3182.
Stafford v. Dunwoodie, 276.
4. Where a mortgage recites, that the mortgagor wishes to place the mortgagee "à l'abri de ses avances d'argent, et des effets des endossements que celui-ci voudra bien lui fournir," it will be considered as having been given to secure past, as well as future advances. *Succession of De Armas*, 342.
5. Acts granting mortgages will, in cases of doubt, be strictly construed. *Ib.*
6. Where a note, secured by mortgage, is prescribed, the mortgage is necessarily extinguished. A mortgage can only exist as an accessory to a principal obligation, with the extinction of which it disappears. C. C. 3251, 3252, 3374. *Auguste v. Renard*, 389.
7. The transfer of a negotiable note, by endorsement, operates a transfer of any mortgage given to secure its payment. C. C. 2615. *Ib.*
8. A railway is not an immoveable, either by nature or destination, when the soil on which it is laid belongs to another; it is, consequently, not affected by judicial or legal mortgages, nor susceptible of being mortgaged unless authorized by a special act of the legislature.
State v. Mexican Gulf Railway Co., 513.
9. Future property can never be the subject of conventional mortgage. C. C. 3276. *Ib.*

See MEXICAN GULF RAILWAY.

NEW ORLEANS, CITY OF,

1. Sect. 4 of the act of 14th March, 1816, which provides that "neither the

Mayor, Recorder, nor any Alderman then in office, shall be allowed, in his own name, or through the medium of others, to become a lessee or bidder for any branch of the revenues of the city, nor for any work or undertaking whatever which may be authorized or ordered by the corporation of the city of New Orleans," cannot be considered as prohibiting such persons from leasing any lot of ground or other property, not forming an entire branch of the revenue of the city.

Second Municipality of New Orleans v. Caldwell, 368.

2. Under the ordinance of the Second Municipality of New Orleans, of 12th July, 1836, which declares, that the tax levied on the owners of the property for the reimbursement of their portion of the expense of paving, "shall be paid in cash within ninety days after the work is done, or in notes endorsed to the satisfaction of the Committee of Finance, at six, twelve, eighteen, and twenty-four months, bearing interest at the rate of eight per cent a year," interest, at that rate, may be recovered from a property-holder who has neglected to pay, within the ninety days, the amount assessed as his share of the cost of such pavement.

Second Municipality of New Orleans v. McFarlane, 406.

NEW ORLEANS AND CARROLLTON RAIL ROAD COMPANY.

1. By the first section of the act of 1 March, 1836, amending the charter of the New Orleans and Carrollton Rail Road Company, it is provided, that "the Company shall pay to the State, in ten equal annual instalments from the acceptance of the present act, seventy-five thousand dollars to be employed by the State for the completion of the Attakapas Canal through Lake Verret, whenever such improvements shall have been undertaken and the work actually commenced by the State, or by any Company legally chartered for the purpose." In an action, under this act, by the State, against the Company, who had accepted the act, for the instalments due: *Held*, that the State is entitled to recover, whether the works or improvements have been commenced or not; and that the defendants have nothing to do with the appropriation of the amount they contracted to pay.

State v. New Orleans and Carrollton Rail Road Co., 418.

2. The liability of the stockholders in the New Orleans and Carrollton Rail Road Company under their subscriptions, is not affected by the act of 14th March, 1839, relieving the Banks from the forfeiture of their charters. If a further call upon those who have not paid in full, be necessary for the discharge of the debts of the Company, the Directors are authorized to make it.

Millaudon v. New Orleans and Carrollton Rail Road Co., 488.

See BANK, 2.

NEW TRIAL.

1. The admission of irrelevant testimony is no ground for remanding a case for a new trial, where its exclusion would not probably vary the result.

Ferguson v. Whipple, 344.

2. Objections to a verdict lose much of their weight, when not made before the court which tried the case originally. A case will be less readily remanded on a question of fact, where a new trial has not been moved for below. An appeal from the judgment of an inferior tribunal, founded on a verdict, should only be taken after the refusal of a new trial.

Hughes v. Lee, 429.

NOTARY.

1. The certificate of a notary, that no note signed or endorsed by a particular person was protested by him within a certain period, is inadmissible. A notary can only certify copies of proceedings in his office; any other fact within his knowledge, must be disclosed under oath.

Exchange and Banking Company of New Orleans v. Boyce, 307.

2. The fees to which a notary public is entitled for his services being fixed by law, he cannot, under any pretence, demand additional compensation.

Walton, &c. v. Their Creditors, 438.

NOVATION.

A debtor does not, by the indication of another as the person to whom he is to pay, become the debtor of the latter; he continues to be the debtor of his original creditor.

State v. New Orleans and Carrollton Rail Road Co. 418.

PARAPHERNAL PROPERTY.

See HUSBAND AND WIFE.

PARTIES.

See APPEAL VI. EVIDENCE XIV. PLEADING II.

PARTITION.

1. The first settlement between heirs or partners, by which a state of *indivision* is terminated, is, in substance, a partition. *Tippett v. Jett*, 313.
2. An action for the nullity or rescission of partitions, is prescribed by five years. C. C. 3507. *Ib.*

See APPEAL 12. PARTNERSHIP 1. 3. 4. 8. 9.

PARTNERSHIP.

1. A partnership is dissolved by the death of one of the partners; and the property must be divided as soon as practicable, unless there be some stipulation to the contrary. *Mathison v. Field*, 44.
2. The representative of a deceased partner may take the necessary measures to protect the interest of the partner he represents; but he cannot administer the partnership affairs, unless authorized to do so by the contract of partnership. *Ib.*

VOL. III.

3. Petition by the syndics of an insolvent for a division of partnership property by sale. Four experts having been appointed, by consent, to report whether the property could be divided in kind, without loss or inconvenience, and two only having reported, on motion of plaintiffs the order appointing experts was rescinded, and the court proceeded to receive other evidence of the facts intended to be established by their report. *Held*, that the report of the experts was not the only mode of proof to which the court might resort, to enable it to decide whether the property should be sold; and that, under art. 1261 of the Civil Code, any other legal evidence might be received.

Kohn v. Marsh, 48.

4. Where, in an action for the settlement of a partnership, the property is such as cannot be divided in kind without loss or inconvenience, a sale may be ordered at once, without waiting for the settlement of the partnership accounts. *Ib.*
5. A partnership formed for the purpose of purchasing timber, sawing it, and selling it for a profit, is, under art. 2796 of the Civil Code, a commercial one.

Succession of Hamblin, 130.

6. Where real property is purchased by a commercial firm, the members of the firm become joint owners thereof; and it cannot be alienated by one partner, without the consent of the rest. C. C. 2796. But where the latter, by receiving a portion of the price, subsequently ratify a sale by the former, they will be estopped from asserting any title to the prejudice of a *bona fide* purchaser. *Thomas v. Scott*, 256.
7. Partners cannot plead ignorance of the transactions of their house. *Ib.*
8. Though the legal title to real property bought by a commercial firm, be in the members individually, each holding an undivided share, the value thereof belongs to the partnership; and a partner, after disposing of his interest therein, cannot avail himself of his legal title to sue for a partition. *Ib.*
9. The property of a partnership is common, held *pro indiviso* by all the partners, responsible for the debts of the concern, and subject, after their payment, to division among the partners, according to their agreement. Each is a debtor for what he promises to bring in; and if one have brought in more than the rest, he is a creditor of the partnership for the difference, and, as between the partners, has a right of retention on the common stock for its repayment, and for any debt of the partnership for which he may be made responsible.

Millaudon v. New Orleans and Carrollton Rail Road Co. 486.

SEE BANK 2. PARTITION 1.

PAYMENT.

1. A note, though made payable in dimes, may be discharged by a payment in any other legal coin of the United States.
Commissioners of the Atchafalaya Rail Road and Banking Co. v. Bean, 414.
2. An agreement, by an attorney at law, to receive payment of a judgment in any thing but the legal currency of the United States, will not be binding on the plaintiff. *Dunbar v. Morris*, 278.

3. The holder of an accepted draft for a sum payable in the notes of a particular Bank protested at maturity, will be entitled to recover the value of the notes at the date of the protest. A subsequent tender of the amount in the notes of the Bank, they having depreciated in the mean time, will not entitle the defendant to settle the debt at the value of the notes at the date of the tender. *Meeks v. Davis*, 326.
4. A payment cannot be imputed to the reduction of the principal, where any interest is due. C. C. 2160. *Shaw v. Oakey*, 361.

PETITORY ACTION.

See EVIDENCE 69, 70, 71.

PLEADING.

- I. *Of the Petition.*
- II. *Parties to Actions.*
- III. *Certain Actions where to be brought.*
- IV. *Exceptions and Answer.*
- V. *Demands in Compensation and Reconvention.*
- VI. *Amendments.*
- VII. *Interrogatories to a Party.*
- VIII. *Admissions.*
- IX. *Striking out Plea.*

I. *Of the Petition.*

1. The signature of the petitioner to an affidavit which the law requires to be annexed to the petition, is a sufficient signature of the petition itself.
Zollicoffer v. Briggs, 236.
2. A party entitled to the compensation due to the owners of the contiguous lots, from a proprietor of the intermediate ground who has made use of their walls, may cumulate in one action the debts due for the use of the walls of both owners. *Kennedy v. Oakey*, 404.

See EMANCIPATION OF SLAVES.

II. *Parties to Actions.*

3. In an action on a joint contract all the obligors must be made defendants, though one of them may have performed his part, or may be domiciliated in a parish beyond the jurisdiction of the court, parties contracting joint obligations being considered to waive the personal privilege of being sued before the court having jurisdiction over the place of their domicile; and the judgment must be against each defendant, separately, for his proportion.
Thompson v. Chrétien, 26. *Drew v. Atchison*, 140.
4. The judgment for costs, in an action on a joint contract, must be *in solido* against those who have not performed their part. *Ib.*
5. In an action on a joint contract, the suit was dismissed by the inferior court

as to one of the defendants, on the ground of his domicile being in a different parish. Plaintiff took no appeal from the judgment of dismissal, but obtained a judgment against the other defendant. On an appeal by the latter : *Held*, that the action being on a joint contract, both contractors must be before the court ; that the plaintiff having failed to make use of the means given him by law to reverse the erroneous decision of the inferior court, cannot avail himself of his own neglect ; and that there must be judgment as in case of nonsuit. *Thompson v. Chrétien*, 28.

6. Where a party to a suit pending before a State court, applies to be declared a bankrupt under the act of Congress of 19th August, 1841, the proceedings must be suspended, for a reasonable time, to enable him to file the decree, when the assignee must be made a party. As soon as the decree in bankruptcy is pronounced, the bankrupt, in relation to all actions for and against him except such as the statute prescribes, is legally dead, and can only be represented by the assignee. *Fisher v. Vose*, 457.

III. *Certain Actions where to be brought.*

7. An overseer, though entitled to a privilege on the crop for the payment of his wages, cannot maintain an action against his employer in the parish in which the plantation is situated, where the domicile of the latter is in a different parish. The privilege granted by law to overseers, is, like all others, an accessory to the principal obligation, and must follow it.

Hollander v. Nicholas, 7.

8. The penalty imposed by the eighteenth section of the act of 7th June, 1806, on the owner or occupier of a plantation, for keeping slaves thereon, without a white or free colored person as manager or overseer, can only be recovered by civil action before an ordinary tribunal. The action must be brought before a Justice of the Peace, a Parish, or District Court, according to the number and amount of the fines claimed. *State v. Linton*, 55.

IV. *Exceptions and Answer.*

9. Discussion, like all other dilatory exceptions, must be pleaded *in limine litis*. It cannot be received after issue joined. *Dwight v. Linton*, 57.
10. Under art. 335 of the Code of Practice, the exception of *litispendencia*, must show the pendency of another suit, between the same parties, for the same object, and growing out of the same causes of action, before another court of concurrent jurisdiction. *Succession of Ludwig*, 92.
11. The exception *litispendencia* must be pleaded *in limine litis*. Where it is not pretended that judgment has been rendered in the first suit, it cannot be admitted in bar. *Long v. Long*, 108.
12. An exception to the jurisdiction of the court, waived below, cannot be revived in the appellate court. *Reynolds v. Rowley*, 201.
13. There is a class of exceptions which may be pleaded for the first time on the appeal ; but the facts necessary to sustain them, must appear from a mere inspection of the record. *Zollicoffer v. Briggs*, 238.

14. A prayer for a trial by jury, by one of two or more debtors bound in *solido*, will not enure to the benefit of those who have not joined therein.

Mulhollan v. Henderson, 297.

15. Where the defendant, in a redhibitory action for the price of a slave, pleads a general denial, and specially denies that he was aware of the alleged unsoundness, he cannot set up in his defence that the alleged defect was one which the buyer might have discovered by simple inspection. Such an exception should have been pleaded specially, to put the plaintiff on his guard, and afford him an opportunity of disproving the fact. *Hivert v. Lacaze*, 357.

16. One who relies on a peremptory exception, founded in law, must plead it specially. *Ib.*

17. The putting a debtor in default, is a condition precedent to the recovery of damages for the violation of a contract. The want of it need not be pleaded, but may be taken advantage of at any time. C. C. 1906.

Hodge v. Moore, 400.

18. Where the petition prays for a judgment against defendants in *solido*, and one of the latter severs in his answer, but does not plead that the obligation is joint only, and judgment is rendered against defendants in *solido*, it will not be disturbed on appeal. *Comstock v. Paie*, 440.

See PARTNERSHIP, 7.

V. Demands in Compensation and Reconvention.

19. Pleas in compensation must be set forth with the same certainty as to amount, dates, &c., as would be necessary if the party setting them up were the plaintiff in a direct action. General allegations will not suffice. *Smith v. Scott*, 258. And so of demands in reconvention. *Jonau v. Ferrand*, 364.
20. A balance due on an unliquidated account, cannot be pleaded in compensation to an action on a due bill or *bon*; nor in reconvention, when unconnected with the plaintiff's claim. *Jonau v. Ferrand*, 364.

VI. Amendments.

21. An amended petition propounding interrogatories to a party to the action, offered after the trial has commenced, will be too late.

Dabbs v. Hemken, 123.

22. As a general rule, amendments should be admitted where the justice of the case will be promoted thereby, but they must be presented before going to trial. The case must be an extraordinary one, to justify the reception of an amendment after the trial has commenced; and the amendment must not be calculated to produce delay. *Ib.*

VII. Interrogatories to a Party.

23. A party to a suit, interrogated as to a particular fact, cannot, under the pretext of answering the interrogatory, annex to his answer letters of a third person, and thus introduce in evidence statements not under oath, for the purpose of influencing the jury on other points in the case.

Reynolds v. Rowley, 201.

24. A party to a suit is not bound to answer interrogatories propounded to him by his opponent, unless ordered to do so by the court. C. P. 318.

Commercial Bank of Natchez v. King, 243.

25. Where an action commenced by an administrator, is carried on, after the expiration of his administration, by the heirs, the defendant cannot examine him as a party, by annexing interrogatories to an amended answer. The term of his administration having expired, he had no interest in the case, and cannot be interrogated as a party. *Hawkins v. Brown*, 310.

VIII. Admissions.

26. Any consent given, or admission made on record, by a party, in the progress of a suit, from which his adversary may derive any legal right, cannot be withdrawn without the consent of the latter, who is entitled to the benefit of its full legal effect. *Aliter*, where such consent or admission confers no right, as where experts have been appointed, by consent, to ascertain a fact, in which case either party may move to rescind the order, or it may be done by the court *ex officio*. *Kohn v. Marsh*, 48.

27. Property of certain minor heirs having been sold by the parish judge, was afterwards seized under an execution by a creditor of the purchaser. The tutor of the heirs opposed the payment of the proceeds of the sale to the creditor, claiming a vendor's privilege for the price yet due, and setting up a mortgage given to secure the payment. In an action subsequently commenced by him, on behalf of the minors, against the syndic of the purchaser, to recover the land : *Held*, that his opposition to the payment of the proceeds to the seizing creditor, could not preclude the minor heirs from claiming the land itself. *Beard v. Morancy*, 120.

28. A defendant will not be permitted, by shifting his grounds of defence, to contradict, by an amended answer, facts stated and admissions made by him in his original answer. *Estill v. Holmes*, 134.

29. Action by the payee on a promissory note. Defendant answered, pleading a failure of consideration, and alleging that the note was given in error, for the price of a tract of land purchased by plaintiff from a person to whom defendant had previously sold it. In an amended answer, filed at a subsequent term, he averred, that the note was executed for the price of a tract of land belonging to the United States, to which plaintiff pretended to have a pre-emption right ; and which he bound himself to convey by a good title to defendant ; that plaintiff had no pre-emption right to the land ; and that the United States had sold the land to a third person, which sale had come to defendant's knowledge, since the last term of the court. The sale by the United States was established. *Held*, that defendant could not be allowed to gainsay the admissions originally made by him, and that he must be estopped by his warranty, as vendor, from praying for a rescission on the ground of want of title in the plaintiff. Judgment in favor of the latter. *Ib.*

30. Where, in an action against the maker of a note, in whose hands different creditors of plaintiff have seized all sums due by him to the latter, defendant denies that he is indebted to the plaintiff, he will not be exempted from the

payment of interest, on the ground of uncertainty as to whom he should pay. Having denied that he was at all indebted, he cannot allege that he was prevented from paying by any uncertainty as to whom he should pay.

Rightor v. S. idell, 375.

See EVIDENCE, 22. 25.

IX. *Striking out Plea.*

31. Instead of striking out any portion of the pleadings, a more regular course is to permit the parties to go to trial, and to reject, on the objection of the opposite party, any evidence offered to sustain such portion.

Jonau v. Ferrand, 364.

POLICE JURY.

The Police Jury of a parish is a political corporation. It may sue and be sued, and act through agents of its own appointment.

McGuire v. Bry, 196.

PRESCRIPTION.

1. The general doctrines relative to the interruption of prescription, do not apply to the period fixed by art. 593 of the Code of Practice, after which no appeal will lie. No appeal can be taken after the expiration of that time, though one may have been dismissed, which was taken within the period.

Griffing v. Boumar, 113.

2. To support the prescription of ten years, the title to the immoveable must be apparently good, and of a character to induce the belief, on the part of the possessor, that it is perfect. A title, defective on its face, will not be sufficient; *aliter*, where the defect proceeds from circumstances or evidence *dehors* the instrument. *Eastman v. Beiller*, 220.

3. Where one assumes to sell without title, or without disclosing the defects in his title, the vendee, in good faith, though holding *a non domino*, may plead the prescription of ten years. Otherwise, where vendor sells only his right or interest, shows what it is, and declines to warrant generally, thus bringing home to the vendee a knowledge of his title. *Ib.*

4. Under the act of 28th February, 1837, actions against the sureties of a sheriff on his official bond, are prescribed by the lapse of two years,

Mulhollan v. Henderson, 297.

5. An action for the nullity or rescission of partitions, is prescribed by five years. C. C. 3507. *Tippett v. Jett*, 313.

6. Where a note, secured by mortgage, is prescribed, the mortgage is necessarily extinguished. A mortgage can only exist as an accessory to a principal obligation, with the extinction of which it disappears. C. C. 3251, 3252, 3374. *Auguste v. Renard*, 389.

PRESUMPTION.

See EVIDENCE, XIII.

PRIVILEGE.

1. Under art. 722 of the Code of Practice, the creditor acquires, by the mere act of seizure, a privilege on the immoveable or moveable property seized, which entitles him to a preference over other creditors, unless the debtor has been declared a bankrupt previous thereto. If the seizure created a privilege only where the property of the debtor was sufficient to pay all his debts, it would only attach when it would be useless.

Campbell v. His Creditors, 106.

2. Art. 301 of the Code of Practice, which declares that the "sheriff may be enjoined from paying the claim of the plaintiff out of the proceeds of the sale of the property seized, if a third person oppose such payment alleging that the defendant has no other property to pay his debts, and pray that the proceeds may be brought into court, to be distributed among all the creditors of the defendant, according to the order of their respective privileges or hypothecations," makes a provision in favor of the creditors who have a *higher privilege* than that of the seizing creditor. It directs the proceeds to be divided among the creditors according to their respective privileges and hypothecations, including the privilege obtained by the seizure. *Ib.*
3. One who has ceased to act as overseer, but continues his services as an agent for the owners of a plantation, has no privilege on the crop for his services in the latter capacity. *Succession of Johnson*, 216.
4. An overseer whose services have continued for one year and for a part of a second, has, under art. 3184 of the Civil Code, § 1, a privilege on the crops of both years, or on either, for the whole amount due him. His privilege on the crop of the past year, may be exercised upon its proceeds, even after it has been sold; but as to the growing crop, his privilege is confined to the crop itself. *Ib.*
5. The holders of notes given for the price of a tract of land, though not identified with the sale by the *paraph* of a notary, will be entitled to a privilege on the thing sold. The *paraph* of the notary is not the only means by which the notes may be identified. Their identity may be proved by his oath. *Ib.*
6. Where the vendors of slaves have left them for a number of years in the possession of the vendee, without taking any steps to preserve their privilege, they cannot assert it to the prejudice of creditors who have obtained judgments against him, or received special mortgages from him. C. C. 3238. *Blackstone v. His Creditors*, 219.
7. A wife has a privilege on the moveables of her husband, for her dotal, but not for her paraphernal property. For the latter, she has only a tacit or legal mortgage, on his immoveables. C. C. 2367, 3182.
Stafford v. Dumwoodie, 276.
8. Defendant having seized under a *fi. fa.* certain moveables belonging to the husband of the plaintiff, the latter procured an injunction, pending which she obtained a judgment against her husband in a suit for separation of property, and, in virtue thereof, caused the moveable property, previously seized by

defendant, to be sold, and purchased it herself, crediting the amount upon her judgment. On a motion to discharge the injunction: *Held*, that by his seizure defendant had acquired a privilege on the moveables seized; that the rights of the wife, being merely paraphernal, gave her no privilege on the moveables; and that having, by the effect of her seizure, disabled the defendant from enforcing his privilege, she was responsible in damages for the injury he sustained from her act. *Ib.*

9. Art. 3499 of the Civil Code does not apply to shipwrights who undertake to build or repair ships or other vessels, whether under a contract for a stipulated sum, or otherwise. It applies only to the claims of workmen or laborers for their daily or monthly wages, and to the sellers of materials for the price thereof, against the person with whom they contract directly, whether the owner or undertaker. *Harrod v. Woodruff*, 335.
10. Where plaintiff in an action commenced by attachment, has obtained a judgment before defendant's application to be declared a bankrupt under the act of Congress of 1841, he will be entitled to a preference on the property attached. *Aliter*, where defendant's application was made before judgment. In the last case no privilege is acquired. *Fisher v. Vose*, 457.

PUBLIC LANDS OF THE UNITED STATES.

1. The Registers of the Land Offices of the United States may, like all other keepers of public records, give copies or extracts from any books or documents in their custody, and such copies, when duly certified, are admissible in evidence; but they cannot attest or certify the contents of such books or documents in any other manner. *Judice v. Chrétien*, 15.
2. The act of Congress of 29th May, 1830, granting pre-emption rights to settlers on the public lands, which provides, sect. 2, that "where two or more persons are settled on the same quarter section, it may be divided between the two first actual settlers, if, by a north and south, or east and west line, the settlement or improvement of each can be included in a half-quarter section, and that in such case the settlers shall each be entitled to a pre-emption of eighty acres elsewhere in said land district," is directory only. Its object is to give to each settler, *first*, the portion of land on which his improvements were made, and *secondly*, as nearly as possible, an equal quantity of land. Equality of value was not considered important. The direction of the line of division was of secondary consideration, and only intended to effect the principal object. *Downes v. Scott*, 84.
3. Where the United States have sold, and given a patent for a tract of land, the property is vested in the purchaser; and the laws of the State in which it is situated operate on it as on other property, except as to taxation, or other special exception; and in effecting a partition, such laws, and the contract of the parties, will, as in other cases, control. *Ib.*
4. In ordering a partition between settlers on the same quarter section, holding as tenants in common, by purchase from the United States, under the pre-emption law of 29th of May, 1830, or between others holding under them, the provisions of that act will be considered as expressing the original

- intention of the parties as to the direction of the line of division, where the quarter section is a regular one; *aliter*, as to irregular or fractional surveys. Where lines drawn north and south, or east or west, would not give to each an equal quantity of land, as well as his improvements, the line must be drawn in some other direction, or the land cannot be divided in kind. *Ib.*
5. Under the act of Congress regulating pre-emptions, the Register and Receiver of the Land Office in the district in which the lands lie, have, alone, authority to decide upon claims for pre-emptions; and proof must be made, to their satisfaction, of all the facts necessary to establish the applicant's right to purchase by preference. *Kellam v. Rippey*, 138.
 6. The right to claim a pre-emption, conferred by act of Congress, does not give the party entitled thereto, any title in or to the land, until he exhibits the necessary proof, and procures the adjudication of the Register and Receiver of the Land District. *Ib.*
 7. In an action by one claiming land under a patent from the United States, against a party in possession who had made valuable improvements thereon, the latter will be entitled to claim the excess of the value thereof above the fruits received since the commencement of suit. *Ib.*
 8. Where one entitled to claim a tract of land, as an actual settler prior to the twentieth of December, 1803, under the act of Congress of the third of March, 1807, relative to land claims in the territories of Orleans and Louisiana, sells all his right, title, and interest therein, and the claim is subsequently confirmed in the name of the original settler, the confirmation will enure to the benefit of his vendee. *Noulen v. Perkins*, 233.
 9. One who sells all his right, title, and interest in an improvement made on the public lands, must be considered as parting with all the ulterior advantages to which he may be entitled in virtue thereof. *Ib.*
 10. In controversies between the original grantee of a tract of land, or those claiming directly under him, and one in whose favor, as assignee, the title has been confirmed by the Commissioners of the United States, the certificate in favor of the latter, and the facts recited in it, will not be evidence, but the confirmation will enure to the benefit of the party having the inchoate title. Otherwise, as to third persons showing no title. The Commissioners appointed to decide upon land titles emanating from the former sovereigns of Louisiana, being authorized, by different acts of Congress, to confirm inchoate titles existing at the time of the change of government, in favor of certain grantees, or *their legal representatives*, had authority, *incidentally*, to decide whether one who claimed, not as the original grantee, was entitled to a confirmation; and such confirmation, in favor of an assignee, has been uniformly regarded as entitling the latter to a patent. It is evidence against the government, and though not binding on the original grantee, or those claiming under him, is *prima facie* evidence against the rest of the world.
Thomas v. Turnley, 206.
 11. A receipt of the Receiver of Public Moneys, for the price of government lands, is sufficient evidence of title from the United States, to form the basis

of a retitory action—not that it is of equal dignity with a patent, but evidence of an equitable title on which the owner may recover.

Lott v. Prudhomme, 293

12. Where the boundaries of a confirmed claim are vague and uncertain, and are to be fixed by the operations of the surveying department, or the confirmation is only the recognition of a pre-existing right, and before such survey and location the government sells a part of the land, not necessarily embraced within the tract confirmed, the title of the purchaser under such sale will prevail. *Ib.*
13. The Commissioner of the General Land Office has no authority to vacate a patent already issued; but he may declare a *certificate of purchase* of lands, which the law has forbidden to be sold or disposed of, to be void. *Ib.*
14. Whenever the question arises, whether the title to property, which belonged to the United States, has passed, it must be resolved by the laws of the United States. But where it has once passed, it becomes, like all other property in the State, subject to State legislation, so far as such legislation is consistent with the admission that the title has so passed. *Ib.*
15. A patent from the United States, for a portion of the public lands, is conclusive, unless attacked on the ground of error or fraud; and the question of error or fraud, so far as it concerns a citizen of this State, must be determined by our laws. *Ib.*
16. The moment a patent for public lands has passed the great seal, it is beyond the power of the officers of the United States. *Ib.*

QUASI-CONTRACTS.

1. The joint owners of a plantation are liable, each for his virile share, for supplies furnished for its use. *Reynolds v. Rowley*, 201.
2. Mere voluntary payments, on some previous occasions, will not, of themselves, create an obligation to pay under future, though similar circumstances. *Hazard v. Lambeth*, 378.
3. Plaintiff having transferred certain shares of bank stock to a third person, for the purpose of enabling the transferee to raise money thereon, defendant caused a *fi. fa.*, which he had obtained against such third person, to be levied on the stock as the property of the latter. The execution was enjoined by plaintiff, who claimed the stock as his own. On a motion to dissolve: *Held*, that by transferring the stock to enable the transferee to raise money thereon, plaintiff made him the apparent owner, and thereby deceived his creditors; and that the injunction was correctly dissolved.

Page v. Porté, 439.

See AGENCY, 3. 5.

QUASI-OFFENCES.

Defendant having seized under a *fi. fa.* certain moveables belonging to the husband of the plaintiff, the latter procured an injunction, pending which she ob-

tained a judgment against her husband in a suit for separation of property, and, in virtue thereof, caused the moveable property, previously seized by defendant, to be sold, and purchased it herself, crediting the amount upon her judgment. On a motion to dissolve the injunction: *Held*, that by his seizure defendant had acquired a privilege on the moveables seized; that the rights of the wife, being merely paraphernal, gave her no privilege on the moveables; and that having, by the effect of her seizure, disabled the defendant from enforcing his privilege, she was responsible in damages for the injury he sustained from her act. *Stafford v. Dunwoodie*, 276.

RAILWAY.

See IMMOVEABLES.

RECEIVER.

1. Though a receiver, appointed to collect money due to the parties to a suit, have no authority to pay debts due by them, yet if they know that he is doing so, and do not object at the time, they cannot do so afterwards.

Kellar v. Williams, 321.

2. Where, on the motion of one of the parties to a suit, with the consent of the other, a third person is appointed by the court to receive and sue for all amounts due to the litigants, on giving bond, with security, to hold the amounts so received subject to the order of the court, he will not be considered an officer of the court, but the agent of the parties, and only responsible as such. The appointment is the act of the parties. *Id.*

See EVIDENCE, 4.

RECONVENTION.

See APPEAL, 6. PLEADING, V.

RECUSATION OF JUDGE.

See SUCCESSIONS, 4.

REDHIBITORY ACTION.

See PLEADING, 15. SALE, VI.

REGISTER OF CONVEYANCES IN NEW ORLEANS.

The act of 20th March, 1827, establishing the office of Register of Conveyances for the city and parish of New Orleans, was intended only to create a particular office, for that city and parish, in which all transfers of immovable property should be recorded, which, in other parishes, were required to be recorded in the office of the parish judge.

Lee v. Darramon, 160.

REGISTRY.

1. The provisions of arts. 697 and 698 of the Code of Practice, requiring the sheriff to cause the act of sale executed by him for property sold under a *fi. fa.*, to be recorded in the office of the clerk of the court from which the writ was issued, were designed to give to the sheriff's deed the authenticity of a notarial act, and to authorize its introduction in evidence without further proof of its execution. They do not repeal, nor in any way modify the act of the 24th March, 1810, which declares, sect. 7, that no notarial act concerning immoveable property shall have effect against third persons, until recorded in the office of the parish judge of the parish in which it is situated; nor that of 26th March, 1813, providing, sect. 1, that sales of land or slaves, under execution, shall, except between the parties, be void, unless so recorded. *Lee v. Darramon*, 160.
2. Where the sheriff's deed for immoveable property sold under a *fi. fa.*, subject to a previous mortgage, has not been recorded in the office of the parish judge of the parish in which the property is situated, it will be without effect as to the hypothecary creditor, who may seize and sell the same as if in possession of the original debtor. *Ib.*

RESCISSION, ACTION OF.

See SALE, VI. EVIDENCE, 72. 73. 74. 75. 76.

RES JUDICATA.

1. The fact that a party was a minor at the time that a judgment was rendered against him, and that his tutor did not attend to, or understand his rights, or take the necessary pains to procure the testimony to establish them, will not entitle him to relief, though it be proved that a different judgment must have been rendered, had the proper testimony been produced in the first instance. The first judgment is *res judicata*. *Towles v. Conrad*, 69.
2. The discovery, since the final decision of the appellate court, of new evidence tending to establish allegations in the original petition, is no ground for enjoining the execution of the judgment. The matter is *res judicata*. *Campbell v. Briggs*, 110.
3. The record of another suit, when offered to support a plea of *res judicata*, is admissible to show what the parties claimed, and what was decided in such suit. So the record of another suit, to which the plaintiffs were parties, though joined with others and in a different capacity, is admissible against them, when offered by the defendants, who were plaintiffs in that case; the latter are entitled to the full benefit of any decision made on the rights of the parties, and to show that the plaintiffs have compromised any of their rights by that suit. *Wells v. Compton*, 171.
4. An injunction will not lie to stay the execution of a judgment for the amount of a note given for the price of a tract of land, on the allegation that, since the rendering of the judgment, plaintiff has discovered that the defen-

dant, his vendor, had no title to the land. The execution can only be resisted by appeal, or action of nullity, or on an allegation of extinguishment by payment, release, confusion, novation, or other legal mode.

Morrison v. Crooks, 273.

RESPITE.

1. A debtor who, being unable to pay all his debts at the moment, transacts with his creditors and obtains from them a delay, is not an insolvent. The concession of a respite is based upon the supposed solvency, or eventual ability of the applicant to pay all his debts. The laws relative to respite are not insolvent laws. *Rasch v. His Creditors*, 407. *Müller v. Rasch*, 410.
2. The debtor who applies for a respite does not seek a discharge from his obligations, nor attempt to impair them. The laws of this State relative to respites are not unconstitutional, nor were they repealed or suspended by the act of congress of 19th August, 1841, establishing a uniform system of bankruptcy. *Ib.*

RULE TO SHOW CAUSE.

1. Where, through error, an order has been made allowing a suspensive appeal on security for costs only, and no transcript of the record has been delivered to the party, the order may be rescinded by the lower court on a rule to show cause. *Mathison v. Field*, 42.
2. Action for \$90 paid to defendant, in error, as owner of a butcher's stall, and for \$2000 damages for forcibly turning plaintiff out and retaining the possession of the stall. Plaintiff having obtained a rule on defendant to show cause why he should not be put in possession, it was made absolute, and defendant appealed. *Held*, that the court erred in ordering a part of the case to be tried on a rule, and leaving the remainder untried. A cause should not be tried on any other day than the one fixed by the court, when called in its turn. C. P. 463.

Gerber v. Marzoni, 370. *Beaudouin v. Rochebrun*, 372.

See ATTORNEY AT LAW, 3. UNITED STATES, OFFICERS OF.

SALE.

- I. *Form and Requisites of a Sale.*
- II. *Warranty.*
- III. *Rights and Obligations of Vendee.*
- IV. *Putting Vendee in Default.*
- V. *Action for Reduction of Price.*
- VI. *Rescission on account of Redhibitory Defects, Fraud, &c.*
- VII. *Privilege of Vendor.*

VIII. *Judicial Sales.*IX. *Sales of Public Lands of the United States.*I. *Form and Requisites of a Sale.*

1. The vendor of a tract of land is bound to put the purchaser in possession ; and where he sells at different times by separate portions, without boundaries, to different persons, the first purchaser must be satisfied before a second can obtain any portion of his. *Wells v. Compton*, 171.
2. Where real property is purchased by a commercial firm, the members of the firm became joint owners thereof; and it cannot be alienated by one partner, without the consent of the rest. C. C. 2796. But where the latter, by receiving a portion of the price, subsequently ratify a sale by the former, they will be estopped from asserting any title to the prejudice of a *bona fide* purchaser. *Thomas v. Scott*, 256.
3. The act of receiving the whole or a part of the proceeds of property, sold without authority, amounts to a ratification of the sale, and will preclude the owner from disturbing the purchaser. *Ib.*
4. A vendor may refuse to deliver the thing sold, though he may have granted a term for the payment, where, from the absconding of the vendee, he would be in imminent danger of losing the price. C. C. 2464. *Cook v. West*, 331.
5. A sale is perfect, between the parties, as soon as they agree as to the thing and the price. As to third persons, the property of the thing sold passes to the vendee, only by delivery. *Ib.*
6. A vendee who has not received the thing sold, nor paid the price, can transfer to a third person only his right to require the delivery of the thing on the payment of the price, or on giving security for its payment at the time agreed on. *Ib.*
7. One who stands by and sees his property sold as belonging to another, will not be permitted to set up his title in opposition to a *bona fide* purchaser, who has bought on the faith of his declarations or apparent acquiescence. *Aliter*, where the purchaser knew the extent of the rights of the claimant, and was not misled by the acknowledgments so made. *Ib.*
8. Where the record does not show whether a slave sold was delivered to the vendee at the time of the adjudication, or after the execution of the notarial act, it will be presumed that the vendor retained possession until the act of sale was passed. C. C. 2588. *Hivert v. Lacaze*, 357.
9. A sheriff has a right to retain possession of property sold by him, during the pendency of a rule to show cause why the sale should not be set aside. *Bayon v. Breedlove*, 387.
10. Parol evidence is admissible to prove an agreement to sell a vessel, anterior to the date of the written act of sale. *Bell v. The Firemen's Insurance Company of New Orleans*, 423. *Bell v. Western Marine and Fire Insurance Co.*, 428.
11. One who has agreed to sell a vessel, but has neither delivered it nor received the price, has an insurable interest, the vessel being still at his risk. *Ib.*

II. *Warranty.*

12. A purchaser, fully aware of the danger of eviction at the time of the purchase, cannot resist payment of the price on the ground of eviction. C. C. 2481. *Estill v. Holmes*, 134.
13. Action by the payee on a promissory note. Defendant answered, pleading a failure of consideration, and alleging that the note was given in error, for the price of a tract of land, purchased by plaintiff from a person to whom defendant had previously sold it. In an amended answer, filed at a subsequent term, he averred, that the note was executed for the price of a tract of land belonging to the United States, to which plaintiff pretended to have a pre-emption right, and which he bound himself to convey by a good title to defendant; that the plaintiff had no pre-emption right to the land; and that the United States had sold the land to a third person, which sale had come to defendant's knowledge, since the last term of the court. The sale by the United States was established. *Held*, that defendant could not be allowed to gainsay the admissions originally made by him, and that he must be estopped by his warranty, as vendor, from praying for a rescission on the ground of want of title in the plaintiff. Judgment in favor of the latter. *Ib.*
14. Art. 2535 of the Civil Code, which provides, that where a purchaser, who was not informed before the sale of the danger of eviction, is, or has just reason to fear that he will be disquieted in his possession, by any claim, he may suspend the payment of the price until he be restored to quiet possession, unless the seller prefer to give security, does not contemplate the case in which a purchaser's fear of being disquieted arises from a naked point of law. Every one is bound, at his peril, to know the law.

Hodge v. Moore, 400.

III. *Rights and Obligations of Vendee.*

15. Where one assumes to sell without title, or without disclosing the defects in his title, the vendee, in good faith, though holding *a non domino*, may plead the prescription of ten years. Otherwise, where vendor sells only his right or interest, shows what it is, and declines to warrant generally, thus bringing home to the vendee a knowledge of his title.
16. Where in a sale of goods, a time for payment is fixed, an agreement to pay interest may be implied. *Shaw v. Oakey*, 361.

Eastman v. Beiller, 220.

IV. *Putting Vendee in Default.*

17. To put the purchaser in default, the vendor must tender for his signature an act drawn up in strict conformity to law, and such as the former is bound to sign. *Hodge v. Moore*, 400.
18. Where, in an action against the purchaser of property sold at auction who had failed to comply with the terms of the sale, for the difference between the price bid by him and that at which it was adjudicated on the second exposure, and for the expenses subsequent to the first sale, it appears that the act of sale prepared by a notary and tendered to defendant, was unaccom-

panied with the certificate required by law, showing what privileges or mortgages existed on the property, the defendant will not be considered to have been put in *mora*. C. C. 2589, 3328. *Ib*.

See PLEADING, 17.

V. Action for Reduction of Price.

19. Action by the transferee of instalments due for the price of land. Defendant pleaded a deficiency in quantity, claimed a diminution of the price, and prayed that his vendors might be made parties, and condemned to refund a portion of the amount already paid. Judgment for the plaintiff, and appeal by defendant, the plaintiff alone being cited. *Held*, that the vendors stood towards the defendant in the capacity of plaintiffs, and should have been made appellees; and that the appeal must be dismissed for want of proper parties. *Moore v. Rutherford*, 60.

See 33, *post*.

VI. Rescission on account of Redhibitory Defects, Fraud, &c.

20. Where the purchaser knew of the defects before the sale, no redhibitory action will lie. *Lebesque v. Bonin*, 12.
21. A *brand* or herd of *running* cattle, advertised and sold as consisting of a certain number, amounted, in fact, to not more than a third. In an action for the price, defendants, having sold a part of the cattle, prayed for a rescission of the sale, or diminution of the price. *Held*, that as defendants could not return all the cattle they had received, the sale could not be rescinded, and that a diminution of the price was properly allowed.
Richard v. Parrott, 75.
22. The express exclusion, in the sale of a slave, of warranty, except as to title, is not, as a general rule, equivalent to a declaration of unsoundness, and will not relieve the vendor from the obligation of disclosing redhibitory vices or maladies, not apparent, which he knows to exist; and the concealment of such defects will be fraud within the meaning of art. 2526 of the Civil Code. *Aliter*, where from the terms of the exclusion, the idea is conveyed that the slave was unsound; in such case, the exclusion will amount to a declaration of unsoundness. *Galpin v. Jessup*, 90.
23. In an action for the price of a slave, the jury, if satisfied that he was addicted to theft, may either rescind the sale, or grant an abatement in the price. *Hawkins v. Brown*, 310.
24. Parol evidence is admissible to show that the vendor made known, at the time of the sale, the defects of the thing sold. *Ib*.
25. In all actions of rescission, the party seeking relief must have offered to restore his adversary to the situation he was in before the contract.
Tippett v. Jett, 313.
26. Proof of an offer by the vendor to annul the sale of a slave, on the payment of a certain sum, will exonerate the plaintiff, in a redhibitory action, from the

necessity of proving a tender of the slave. The tender would have been useless, without the payment of the sum demanded.

Hivert v. Lacaze, 357.

27. Concealment by the vendor of a slave, of the fact that the intellect of the slave was not sound, is a fraud upon the purchaser, and will annul the sale. And so, though the sale was made, in the absence of the owner, by an agent aware of the defect. *Ib.*

28. Concealment by the vendor of any vice or defect in a slave, is no fraud, unless such vice or defect would furnish ground for redhibition.

Gros v. Bienvenu, 396.

29. The purchaser of a slave, to entitle himself to the benefit of the third section of the act of 2d January, 1834, which provides that one who institutes a redhibitory action on the ground that the slave is a runaway or thief, shall not be bound to prove that such vice existed before the sale, when discovered within two months thereafter, where such slave had not been more than eight months in the State, must show that the slave has not resided therein for eight months preceding the sale. *Smith v. McDowell*, 430.

See PLEADING, 15.

VII. *Privilege of Vendor.*

30. The holders of notes given for the price of a tract of land, though not identified with the sale by the *paraph* of a notary, will be entitled to a privilege on the thing sold. The *paraph* of the notary is not the only means by which the notes may be identified. Their indenture may be proved by his oath.

Succession of Johnson, 216.

31. Where the vendors of slaves have left them for a number of years in the possession of the vendee, without taking any steps to preserve their privilege, they cannot assert it to the prejudice of creditors who have obtained judgments against him, or received special mortgages from him. C. C. 3238.

Blackstone v. His Creditors, 219.

VIII. *Judicial Sales.*

32. In an action, by the purchaser, at a sale under execution, of the undivided shares of certain heirs in a succession, against the administrator, for paying over the amount to the heirs after notice, the defendant cannot set up any irregularity or nullity in the original proceeding against the heirs; the payment is at his peril, and he will be liable over to the purchaser.

Noble v. Nettles, 152.

See SUCCESSIONS, IV.

IX. *Sales of Public Lands of the United States.*

See PUBLIC LANDS OF THE UNITED STATES.

SHERIFF.

1. No particular form is prescribed by law for a warrant or execution, on behalf of the State, against a delinquent tax collector. A writ signed by the Treasurer, commanding the proper officer, "in the name of the State of Louisiana," is a sufficient compliance with the provision of sect. 6, art. 4, of the State constitution, in regard to the style of process.
Scarborough v. Stevens, 147.
2. The second section of the act of 20th March, 1816, requires that the property of a delinquent sheriff, which has been seized under execution issued by the Treasurer of the State, shall be sold for cash, and without appraisalment. *Ib.*
3. Where a sheriff has received a tax roll and undertaken its collection, he must show that he has used due diligence. He cannot throw upon the State, the burden of proving that he actually received the amount. *Ib.*
4. Defendant, a sheriff, having received the tax roll, and given security for its collection, enjoined an execution issued against him by the Treasurer for the amount, on the ground that he had no legal authority to collect, no assessors having been appointed, nor assessment regularly made. There was no allegation or proof of any difficulty in making the collections in consequence of such pretended irregularity, nor any proof that defendant hesitated, on that account, to proceed with the collection. On a motion to dissolve the injunction: *Held*, that such illegality not having been objected by the tax payers, it is too late for the sheriff to interpose such an objection. *Ib.*
5. The law having provided the mode by which a sheriff, who has undertaken to collect the taxes, can obtain a credit for the amounts due from non-residents or insolvents, he will not be allowed, by enjoining an execution issued against him by the Treasurer, to retain such amounts. He must resort to the means pointed out by law, to establish the credit to which he is entitled.
Ib.
6. Under the twenty-first sect. of the act of 27th March, 1813, a sheriff who fails to pay over, according to law, the taxes collected by him, will be entitled to no commission for their collection. *Ib.*
7. In a sale under execution, on a twelve months' credit, the sheriff is the agent of the party for whose benefit the sale is made, in taking bond from a purchaser. He is liable to the former if he accept insufficient, and to the latter if he refuse sufficient surety; and is, therefore, the proper judge of its sufficiency. *Wells v. Moore*, 154.
8. The sureties on a bond given by a sheriff for the collection of the parish taxes, cannot, when sued as sureties for a portion of the taxes collected but not paid over by the sheriff, contest the legality of the ordinances of the Police Jury making the assessment. By receiving the tax roll, and executing the bond, the sheriff and his sureties recognized the authority of the Police Jury. It is too late to contest the validity of their ordinances, after having acted under them, and collected the taxes. *M'Guire v. Bry*, 196.
9. Separate bonds may be taken from a sheriff for the collection of the state and parish taxes, though one bond would be sufficient. *Ib.*

10. Bond, in the sum of \$8935, for the collection of the parish taxes, "ac-
cordingly to the assessment roll." The taxes for ordinary parochial purposes
amounted to \$3573 66, and there was a special tax, of an equal amount, col-
lected for a particular purpose. In an action on the bond: *Held*, that the
sureties were bound for both, it being improbable that a bond would be exe-
cuted for \$8935, to secure the payment of \$3573 66 only. *Ib.*
11. Under the act of 28th February, 1837, actions against the sureties of a
sheriff on his official bond, are prescribed by the lapse of two years.
Mulhollan v. Henderson, 297.
12. A sheriff has a right to retain possession of property sold by him, during
the pendency of a rule to show cause why the sale should not be set aside.
Bayon v. Breedlove, 383.

See ATTORNEY, DISTRICT.

SHIPPING.

1. Parol evidence is admissible to prove an agreement to sell a vessel, ante-
rior to the date of the written act of sale. *Bell v. Firemen's Insurance*
Company of New Orleans, 423. *Bell v. Western Marine and Fire Insur-*
ance Co., 428.
2. One who has agreed to sell a vessel, but has neither delivered it nor re-
ceived the price, has an insurable interest, the vessel being still at his risk.
Ib.

STATUTES, CITED, EXPOUNDED, &c.

- I. *Statutes of the United States.*
- II. *Statutes of the State.*
- III. *Statutes of Mississippi.*
- IV. *Statutes of New York.*

I. *Statutes of the United States.*

- 1790, May 26. Authentication of judicial proceedings of other States. *Suc-*
cession of Bowles, 33. *Reynolds v. Rowley*, 201. *Union Bank of*
Maryland v. Freeman, 485.
- 1804, March 27. Authentication of records and exemplifications of office
books, &c. of any public office, not appertaining to a court, of any
State or territory. *Reynolds v. Rowley*, 201.
- 1805, March 2. Adjustment of land claims in territory of Orleans and dis-
trict of Louisiana. *Eastman v. Beiller*, 290.
- 1806, February 28. Extending powers of Surveyor General, and relative to
land claims in territory of Orleans and district of Louisiana. *Ib.*
- , April 21. Supplementary to act of 2 March, 1805, for the adjustment
of land claims in territory of Orleans and district of Louisiana. *Ib.*
- 1807, March 3. Respecting claims to land in territories of Orleans and Lou-
isiana. *Ib.*

- 1830, May 29, § 2. Pre-emption rights of settlers on public lands. *Downes v. Scott*, 84.
- 1834, June 19. Pre-emption rights of settlers on public lands. *Kellam v. Rippey*, 138. *Baillio v. Burney*, 317.
- 1838, June 22. Pre-emption rights of settlers on public lands. *Kellam v. Rippey*, 138.
- 1841, August 19. Establishing uniform system of bankruptcy. *Rasch v. His Creditors*, 407. *Fisher v. Vose*, 457.

Statutes of the State.

- 1806, June 7, § 18, 21. Penalty for keeping slaves without a white or free colored person as overseer. *State v. Linton*, 55.
- 1807, March 9. Emancipation of slaves. *Nolé v. De St. Romes*, 484.
- 1809, March 18, § 8. Amending Code of 1808—judge referred to in acts concerning minors. *Succession of Winn*, 303.
- 1810, March 24, § 7. Recording of notarial acts. *Lee v. Darramon*, 160.
- 1813, March 25, § 5. Powers of Police Juries. *McGuire v. Bry*, 196.
- 26, § 1. Recording of certain acts—sales of land or slaves under *fi. fa.* *Lee v. Darramon*, 160.
- 27, § 21. Taxes—collector of, failing to pay over, to lose his commissions. *Scarborough v. Stevens*, 47.
- 1816, March 14, § 4. City of New Orleans—Mayor, Recorder, Aldermen to lease or bid for any branch of revenue of. *Second Municipality of New Orleans v. Caldwell*, 368.
- 20, § 2. Revenues of the State—execution against delinquent sheriff and sureties. *Scarborough v. Stevens*, 47.
- § 18. Police Juries—ordinances of, how signed and promulgated. *McGuire v. Bry*, 196.
- 1817, February 22, § 21. Revenues of the State—commissions of prosecuting attorneys on amounts collected by them. *Scarborough v. Stevens*, 47.
- 1818, March 18. Creating offices of Surveyor General and Parish Surveyor. *Wells v. Cotton*, 171.
- 1823, March 27, § 3. Attorneys—proceedings against, for fraudulent practice or other offences. *State v. Judge of First District*, 416.
- 1827, January 31. Emancipation of slaves. *Nolé v. De St. Romes*, 484.
- , March 13. Bills of exchange and promissory notes. *Duncan v. Sparrow*, 164, 167.
- 20. Creating office of Register of Conveyances for New Orleans. *Lee v. Darramon*, 160.
- 1828, March 12. Repealing Civil Code of 1808, except chap. 3, title 10, book 1. *Noble v. Nettles*, 152.
- 25, § 4. Amending Civil Code and Code of Practice—attachments, arrests, and sequestrations to be issued on filing bond and affidavit. *Briggs v. Spencer*, 265.
- , § 11. ——— registry of sheriff's sales. *Lee v. Darramon*, 160.

- 1828, March 25, § 7. Amending Civil Code and Code of Practice—service of interrogatories under a commission on opposite party. *Tollett v. Jones*, 274.
- 1830, March 15, § 21. Revenues of the State—sheriff's bonds for collection of taxes. *McGuire v. Bry*, 196.
- 1831, March 25, § 1. Amending Code of Practice—recusation of parish judge. *Ex parte Borden*, 399.
- , § 3. Injunctions. *Dabbs v. Hemken*, 123.
- 1833, February 9. Charter of New Orleans and Carrollton Rail Road Company. *Millaudon v. New Orleans and Carrollton Rail Road Co.*, 488.
- 1834, January 2, § 3. Presumption in actions for rescission of sales of slaves not eight months in the State. *Smith v. McDowell*, 430.
- , March 10, § 2. Advertisements of public sales. *Griffing v. Bowmar*, 113. *Beard v. Morancy*, 119.
- , § 2. Assurance of titles of purchasers at judicial sales. *Griffing v. Bowmar*, 113.
- 1835, April 1. Amending charter of the New Orleans and Carrollton Rail Road Co. *State v. New Orleans and Carrollton Rail Road Co.*, 418. *Millaudon v. Same*, 488.
- 1836, March 1. Amending act of 1 April, 1835, relative to charter of New Orleans and Carrollton Rail Road Co. *Ib.*, 418, 488.
- 1837, February 28. Prescription of actions against sheriff or his sureties. *Mulhollan v. Henderson*, 297.
- , March 11, § 2. Bail—release of. *State v. Martel*, 22.
- 13. To expedite construction of New Orleans and Nashville Rail Road. *State v. Mexican Gulf Railway Co.*, 513.
- 1838, March 12. Amending act of 13 March, 1837, for expediting construction of New Orleans and Nashville Rail Road—loan to Mexican Gulf Railway Company. *Ib.*
- 1839, March 14. Relieving Banks from forfeitures of charter. *Millaudon v. New Orleans and Carrollton Rail Road Co.*, 488.
- 20, § 3. Amending Code of Practice—summary proceedings against surety on attachment bond. *Wallace v. Glover*, 411.
- § 19. ——— defects, errors, and irregularities in appeals, time allowed to correct. *Lee v. Kemper*, 1. *Grand Gulf Rail Road and Banking Co. v. Douglass*, 169.
- § 24. ——— trial by jury in actions on unconditional obligations to pay certain sum, when allowed. *Smith v. Scott*, 258.
- § 6. Charter of Attakapas Canal Company through Lake Verret—authority to company to receive sum from New Orleans and Carrollton Rail Road Co. *State v. New Orleans and Carrollton Rail Road Co.*, 418.

- 1842, February 5. Reviving charters of Banks in New Orleans. *Id.*
 —, March 14. Liquidation of Banks. *Commissioners of the Atchafalaya
 Rail Road and Banking Co. v. Bean*, 414.
 ———— 26. Payment of notes due to Banks in liquidation—their own notes
 to be received in payment, when. *Id.*

III. Statutes of Mississippi.

Authorizing stay of execution when property will not sell for two-thirds of
 appraised value. *Briggs v. Spencer*, 285.

IV. Statutes of New York.

Establishing rate of interest. Revised Statutes, Ed. 1836, Part II, Chap. IV,
 Tit. 3. *Shaw v. Oakley*, 361.

SUBROGATION.

See SURETY, 1. 2. 12.

SUCCESSIONS.

- I. *Jurisdiction in matters of Succession.*
- II. *Of Executors, Administrators, and Curators.*
- III. *Acceptance of Successions, and Rights and Responsibility of
 Heirs.*
- IV. *Sale of Property of Successions.*
- V. *Claims against Successions.*

I. Jurisdiction in matters of Succession.

1. Where the creditors of a succession are litigating their rights contradicto-
 rily with each other, and the value of the succession exceeds three hundred
 dollars, an appeal will lie to the Supreme Court, though the claim of each
 creditor may not amount to that sum. *Succession of Field*, 5.
2. Art. 996 of the Code of Practice, which authorizes actions for debts due
 from a succession to be brought before the ordinary tribunals, where the
 heirs, though all or some of them be minors, are in possession of the estate,
 should, perhaps, be confined either to heirs absolute, or to beneficiary heirs
 in possession of a succession after it has been fully administered. But
 where a succession appears to have had but few debts, and to have been
 administered to a certain extent, and to have been in the possession of the
 widow and heirs of the deceased for several years, an action to recover a
 debt due by it, may be brought before the courts of ordinary jurisdiction.
Porter v. Muggah, 29.
3. Courts of Probate have exclusive jurisdiction of claims for money against
 successions administered by curators, executors, &c.; and all suits for money,
 pending before the ordinary tribunals, against one who dies leaving a vacant

succession, must be transferred to the Court of Probates of the place where his succession is opened. *Succession of Ludewig*, 92.

4. The first section of the act of 25th March, 1831, which provides that whenever the Parish Judge of any parish is disqualified by interest, or otherwise, to try any case in the Parish Court, that the District Court shall have jurisdiction thereof, and that the same shall be transferred by the Parish or Probate Court to the District Court, does not contemplate the transfer of all the mortuary proceedings and documents relative to any estate in which the Judge of Probates may be interested. The District Court may take cognizance of the appointment of a curator, where the Probate Judge is interested; but it is not necessary for this purpose, that the papers relative to the succession should be removed from their proper place of deposit.

Ex parte Borden, 399.

II. Of Executors, Administrators, and Curators.

5. In an action, by the purchaser, at a sale under execution, of the undivided shares of certain heirs in a succession, against the administrator, for paying over the amount to the heirs after notice, the defendant cannot set up any irregularity or nullity in the original proceeding against the heirs; the payment is at his peril, and he will be liable over to the purchaser.

Noble v. Nettles, 159.

6. The acknowledgment and payment by curators and executors, of debts due from the estates administered by them, are *prima facie* evidence of their correctness. When, from the extravagance of the charges, the unnecessary character of the supplies, or from any other circumstance, bad faith or dishonesty may be presumed, courts cannot be too strict; but where there is every appearance of good faith and correct management, such fiduciaries should not be held, in the settlement of their accounts, to the strictest rules of evidence. Were they obliged to prove the signatures to every receipt, the cost of the attendance of witnesses or of their depositions, would involve the estates in heavy and unnecessary expense.

Succession of Frantum, 283.

7. Full commissions of two and a half per cent on the productive property, may be allowed to an administrator, though the whole estate has not been fully administered by him. *Ib.*
8. Before delivering the whole estate into the hands of an universal heir, the executor has a right to require, that a sufficient sum be placed in his hands to pay the particular legacies. C. C. 1664. *Succession of Carraby*, 349.

See COURTS, 8. EVIDENCE, 21. 59. PARTNERSHIP, 2.

III. Acceptance of Successions, and Rights and Responsibility of Heirs.

9. Heirs of age can accept a succession simply, or do acts rendering themselves unconditionally liable. Minors are necessarily beneficiary heirs.

Porter v. Muggah, 29.

10. The heirs should be informed of every act of an executor or creditor, which may charge or materially affect the property of a succession.

Succession of Bowles, 35.

11. Under art. 647 of the Code of Practice, the undivided share of an heir in a succession, may be seized and sold under execution. *Noble v. Nettles*, 153.

12. In an action, on an open account, against the heirs amongst whom a succession has been partitioned, for articles furnished to their ancestor, interest will be allowed from judicial demand, and not from the death of the ancestor. *Barney v. Brown*, 270.

13. Illegitimate children, though duly acknowledged, have no claim against the estate of their natural father, but for alimony. C. C. 224, 257, 913.

Liautaud v. Baptiste, 441.

14. The rights acquired by children legitimated by the subsequent marriage of their parents, have no effect against gratuitous dispositions, previously made by the latter. The legitimation has no retroactive effect. It operates only from the date of the marriage. C. C. 219, 948, 1556. *Ib.*

IV. Sale of Property of Successions.

15. A sale by the administrator of a succession of property held by the deceased, subject to a mortgage, gives the mortgagee no claim against the succession. His rights cannot be affected by such a sale; and he must pursue the property in the hands of the subsequent third possessor.

Succession of Field, 5.

16. Notice must be given to the forced heirs, of any application to sell the property of a succession in which they are interested. It may be to their interest to prevent a sale, by furnishing the means necessary to extinguish the debts and legacies. *Succession of Bowles*, 35.

17. An application by an executor for authority to sell a part of the effects of a succession, is in the nature of a rule to show cause; and it is only necessary that reasonable notice thereof should be given to the parties interested.

Ib.

18. The testator had bequeathed all his estate to his mother and one of his sisters. An order for a sale of the property having been procured by the executor, a sister of the deceased, to whom no part of the estate had been left, obtained an injunction to prevent the sale, and the curator of the testator's mother, an interdicted person, intervened in the suit, alleging that the latter was a forced heir recognized by the will, that the injunction was for her benefit as well as the plaintiff's, claiming part of the damages sued for, and praying to be allowed, with the consent of the plaintiff, to unite with the latter, and to pay a part of the costs. Answer by defendant to the petition of intervention, denying the right of the curator to intervene; and judgment dissolving the injunction, and ordering the executor to proceed with the sale. On an appeal by plaintiff and intervenor: *Held*, that the plaintiff, having no interest in the succession of the testator, had no right to interfere with its administration; and that no judgment having been rendered for or against the intervenor in the lower court, his appeal must be dismissed.

Field v. Mathison, 38.

19. The decree of the Court of Probates where the succession is opened, made in conformity to the advice of a family meeting, is necessary to authorize the sale of property belonging to minor heirs; and where such a decree has been made, the court will not look beyond it. *Beard v. Morancy*, 119.
20. Where a stranger to a succession withholds the price of property purchased at a sale of its effects, an action for the amount can be brought only before a court of ordinary jurisdiction. *Aliter*, where a legatee and universal heir seeks to avail himself of the privilege allowed by art. 1265 of the Civil Code, of retaining the price of property so adjudicated, until his share shall be fixed by a partition. The rights of a co-heir, who exercises this privilege, must be settled contradictorily with the other heirs, under the direction of the Court of Probates, whose decree must fix the portion coming to each. Until this be done, the heir who purchases keeps the purchase money as a kind of deposit, subject to the decision of the Court of Probates, which must determine what he is to pay over. The court which makes such a decree, must have authority to enforce obedience to it. *Succession of Carraby*, 349.

See EVIDENCE, 20. SALE, VIII.

V. *Claims against Successions.*

21. The provision of art. 984 of the Code of Practice, requiring the holder of any claim for money against a succession to present it to the curator or executor before commencing an action, is like the amicable demand to be made of a debtor before suit. Its omission may prevent the recovery of costs, but not that of the debt itself. *Fisk v. Friend*, 264.

SUMMARY PROCEEDINGS.

1. The surety in an attachment, though a resident of a different parish, may, under the third section of the act of 20th March, 1839, be proceeded against, summarily, before the court by which the original suit was decided. The object of that section was to authorize the court before which the action was instituted, to determine all questions, principal and incidental, raised in the course of the proceedings, and thus to secure a speedy adjustment of the rights of the plaintiff. *Wallace v. Glover*, 411.
2. Whenever a question arises out of a bail bond, it is incidental to the main action, and may be tried summarily, without instituting a new suit. *Id.*

See EXECUTORY PROCESS.

SURETY.

1. Subrogation, whether legal or conventional, invests the person in whose favor it takes place, with all the rights, actions, privileges, and mortgages of the creditor against his debtor. *King v. Dwight*, 2.
2. One who has paid the debt due to a plaintiff, and been expressly subrogated to his rights, may take out execution against the defendant. Such an

- express subrogation, is equivalent to an authority to use the plaintiff's name in prosecuting the suit for the recovery of the debt. *Ib.*
3. An accommodation endorser must be viewed in the light of a surety, and as such is entitled to discuss the property of his principal.
Dwight v. Linton, 57.
 4. The purchaser of property sold under a *fi. fa.* on twelve months' credit, having offered defendants' testator to the sheriff as security for the price, received a blank bond from the sheriff to be signed by himself and the testator, and filled up on its return. The bond was signed, but not returned to the sheriff till after the death of the surety, which happened a few days after he signed the instrument, when it was filled up. *Held*, that the security having been previously approved by the sheriff, the contract was complete by the signature of the former. *Wells v. Moore*, 154.
 5. The sureties on a bond given by a sheriff for the collection of the parish taxes, cannot, when sued as sureties for a portion of the taxes collected but not paid over by the sheriff, contest the legality of the ordinances of the Police Jury making the assessment. By receiving the tax roll, and executing the bond, the sheriff and his sureties recognized the authority of the Police Jury. It is too late to contest the validity of their ordinances, after having acted under them, and collected the taxes. *McGuire v. Bry*, 196.
 6. Notice to a principal that, if he do not pay before a certain time, suit will be commenced against him, is not such an agreement for indulgence as precludes the party from suing, and thereby discharges the surety. *Ib.*
 7. Bond, in the sum of \$8935, for the collection of the parish taxes, "agreeably to the assessment roll." The taxes for ordinary parochial purposes amounted to \$3573 66, and there was a special tax, of an equal amount, collected for a particular purpose. In an action on the bond: *Held*, that the sureties were bound for both, it being improbable that a bond would be executed for \$8935, to secure the payment of \$3573 66 only. *Ib.*
 8. Where in an action against sureties who are bound jointly only, they claim in their answer the benefit of division, and it is not alleged that either is insolvent, the judgment must be against each for his virile portion. *Ib.*
 9. A surety who binds himself with his principal, *in solido*, is not entitled to the benefit of discussion; and may be sued alone for the whole debt. His obligation must be regulated by the principles applicable to debtors *in solido*. C. C. 3014. *Smith v. Scott*, 258.
 10. Under the act of 28th February, 1837, actions against the sureties of a sheriff, on his official bond, are prescribed by the lapse of two years.
Mulhollan v. Henderson, 297.
 11. A prolongation of the term granted to the principal debtor, without the consent of the surety, will release the latter. C. C. 3032. *Calliham v. Tanner*, 299.
 12. A surety, who pays the debt of his principal, is entitled to all the rights of the creditor against the latter; for, however desperate his situation may be at any particular time, it may improve, and offer, ultimately, complete indemnity. *Ib.*

13. A party, who seeks to render another liable for the debt of a third person, must prove such liability beyond all doubt, or he cannot recover. C. C. 3008.

Hazard v. Lambeth, 378.

See ATTACHMENT, 4. BAIL.

SURVEY.

In all surveys, courses and distances must yield to natural and ascertained objects. *Wells v. Compton*, 171.

See EVIDENCE, 23.

SURVEYOR, PARISH.

1. Parish Surveyors are regularly appointed officers known to the law, and when dead, their declarations, taken in other suits, may be used, when necessary, as evidence to explain their acts. So plats made by a Parish Surveyor under orders of court, in a suit to which defendant was a party, are admissible after the decease of the former, to prove the declarations of the defendant made at the time of the survey. *Wells v. Compton*, 171.
2. The official acts and certificates of Parish Surveyors are entitled to full faith and credit, in all of the courts of this State. *Ib.*
3. The *procès-verbal* of a survey made by a Parish Surveyor, is legal evidence of the acts which it recites, as that notice was given, that the parties attended, &c. *Ib.*

See EVIDENCE, 23.

TAX COLLECTOR.

See SHERIFF.

TRIAL.

Action for \$90 paid to defendant, in error, as owner of a butcher's stall, and for \$2000 damages for forcibly turning plaintiff out and retaining the possession of the stall. Plaintiff having obtained a rule on defendant to show cause why he should not be put in possession, it was made absolute, and defendant appealed. *Held*, that the court erred in ordering a part of the case to be tried on a rule, and leaving the remainder untried. A case should not be tried on any other day than the one fixed by the court, when called in its turn. C. P. 463.

Gerber v. Marzoni, 370. *Beaudouin v. Rochebrun*, 372.

See NEW TRIAL.

TUTOR.

See MINOR.

UNITED STATES, OFFICERS OF.

A rule cannot be taken on an officer of the United States, in his official capacity, to show cause why he should not pay over money, seized in his hands under a *fi. fa.*, as the property of a third person. To condemn him to pay as an officer, would be to condemn the government, which cannot be done. *Mechanics and Traders Bank of New Orleans v. Hodge*, 373.

VERDICT.

See APPEAL. 40. JURY, 1. 2. 4. 7.

WARRANTY.

See SALE, 12. 13. 14. 15. 22.

WILL.

See DONATIONS, II. III.

E. H. C.

END OF VOLUME III.

ERRATA.

Page 1, line 18 from top, for *applicant*, substitute *appellant*.

" 26, " 6 " *places*, " *place*.

" 94, " 14 " *services*, " *service*.

" 326, " 12 " *rendered*, " *tendered*.

" 420, " 10 " *6th*, " *5th*.

" 489, " 29 " insert *each* after *share*.

" 492, " 5 " for *6th April*, 1833, substitute *9th February*, 1833.

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